(1) Supreme Court, U.S.
FILED

00 938 DEC - 5 2000

No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

ANDREW S. GRUMHAUS and
LESLIE GRUMHAUS DAVIDSON,
Petitioners,

v.

COMERICA SECURITIES, INC.,
as successor-in-interest to Comerica
Financial Services, Inc.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT P. BRAMNIK
Counsel of Record
JONATHAN W. YOUNG
THOMAS I. MATYAS
CHRISTOPHER M. KANIS
WILDMAN, HARROLD, ALLEN & DIXON
225 WEST WACKER DRIVE
CHICAGO, IL 60606-1229
(312) 201-2000

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

67 PP

QUESTIONS PRESENTED

1. Does the national policy favoring arbitration, as embodied in the Federal Arbitration Act and related decisional authority, permit a court to find a waiver of the right to arbitrate a dispute in the absence of prejudice to the party opposing arbitration?

2. Does a court of appeals have jurisdiction over an appeal from an order compelling arbitration, where the underlying action involved substantive issues in which the question of arbitrability was "embedded?"

RULE 14.1(b) AND 29.6 STATEMENT

The parties in the court of appeals were Petitioners Andrew S. Grumhaus and Leslie Grumhaus Davidson and Respondent Comerica Securities, Inc., as successor-in-interest to Comerica Financial Services, Inc.

In its appellate brief, Respondent identified its corporate ownership as follows:

> Comerica, Inc. (a publicly traded corporation) owns 100% of Comerica Bank & Trust, a National Association. Comerica Bank & Trust owns 100% of Comerica Investment Services, Inc. Comerica Investment Services, Inc. owns 100% of Comerica Securities, Inc., the Appellant in this litigation.

Brief of Defendant-Appellant Comerica Securities, Inc., Circuit Rule 26.1 Disclosure Statement.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 14.1(b) AND 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

A. Factual Background 3
B. The State Court Litigation 5
C. Drew and Leslie Seek Arbitration 7
D. Proceedings in the District Court 8
E. Proceedings in the Seventh Circuit 11
1. Jurisdiction 11
2. Waiver and Prejudice 12
3. The Seventh Circuit's Decision . . 12

REASONS FOR GRANTING THE WRIT 14

I. THE COURTS OF APPEALS ARE IN SUBSTANTIAL CONFLICT AS TO THE SIGNIFICANCE OF PREJUDICE IN AN ANALYSIS OF ARBITRAL WAIVER. 15
A. The Majority Viewpoint 15
B. The Minority Viewpoint 20

C. The Seventh Circuit 21

II. THE ISSUE OF ARBITRAL WAIVER IS FREQUENTLY LITIGATED, AND OF GREAT SIGNIFICANCE TO THE AVAILABILITY OF ARBITRATION AS AN ALTERNATIVE FORM OF DISPUTE RESOLUTION 24

III. THE SEVENTH CIRCUIT'S APPROACH TO ARBITRAL WAIVER CANNOT BE SQUARED WITH EITHER THE NATIONAL POLICY FAVORING ARBITRATION OR THE PRECEDENTS OF THIS COURT. 25

IV. THE SEVENTH CIRCUIT LACKED APPELLATE JURISDICTION OVER THE CASE BELOW. 29

CONCLUSION 29

APPENDIX

Appendix A
Opinion of the United States Court of Appeals for the Seventh Circuit, dated August 3, 2000 . . . . . 1a

Appendix B
Memorandum and Order of the United States District Court for the Northern District of Illinois Eastern Division, dated November 23, 1999 . . . . . 12a

Appendix C
Judgement of the United States District Court for the Northern District of Illinois Eastern Division, dated November 19, 1999 . . . . . 24a

Appendix D
Order of the United States Court of Appeals for the Seventh Circuit, dated September 7, 2000 . . . . . 26a

TABLE OF AUTHORITIES

Cases

Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer, 311 F.Supp. 68 (D. S.C. 1970) 17

Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982) 27

Brown v. E.F. Hutton & Co., Inc., 610 F. Supp. 76 (S.D. Fla. 1985) 28

Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th Cir. 1995) . . . . . *passim*

Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2nd Cir. 1968) 19

Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329 (4th Cir. 1971) 17, 19

Commercial Union Ins. Co. v. Gilbane Building Co., 992 F.2d 386 (1st Cir. 1993) 19

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 16, 24, 26, 27

Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691 (9th Cir. 1986) 16, 20, 27

Fraser v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 817 F.2d 250 (4th Cir. 1987) 17, 19

Frye v. Paine, Webber, Jackson & Curtis, Inc.,
877 F.2d 396 (5th Cir. 1989) 20

Gavlik Construction Co. v. H.F. Campbell Co.,
526 F.2d 777 (3rd Cir. 1975) 18, 19, 22

Hoffman Construction Co. of Oregon v.
Active Erectors and Installers, Inc.,
969 F.2d 796 (9th Cir. 1992) 20

Hoxworth v. Blinder, Robinson & Co., Inc.,
980 F.2d 912 (3d Cir. 1992) 19

Iowa Grain Co. v. Brown,
171 F.3d 504 (7th Cir. 1999) 11, 23

Kramer v. Hammond,
943 F.2d 176 (2nd Cir. 1991) 19

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 15, 24, 28

Maxum Foundations, Inc. v. Salus Corp.,
779 F.2d 974 (4th Cir. 1985) 17, 19

Menorah Ins. Co. v. INX Reinsurance Corp.,
72 F.3d 218 (1st Cir. 1995) 19

Metro Industrial Painting Corp. v.
Terminal Construction Corp.,
287 F.2d 382 (2nd Cir. 1961) 26

Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
39 F.3d 1482 (10th Cir. 1994) 21

Midwest Window Systems, Inc. v. Amcor Industries, Inc.,
630 F.2d 535 (7th Cir. 1980) 21

Miller Brewing Co. v. Fort Worth Distributing Co., Inc.,
781 F.2d 494 (5th Cir. 1986) 19

Mitsubishi Motors, Corp. v. Soler Chrylser-Plymouth, Inc.,
473 U.S. 614 (1985) 15, 24

Moses H. Cone Memorial Hospital v.
Mercury Construction Co.,
460 U.S. 1 (1983) 15, 26

Napleton v. General Motors Corp.,
138 F.3d 1209 (7th Cir. 1998) 11, 29

National Foundation for Cancer Research v.
A.G. Edwards & Sons,
821 F.2d 772 (D.C. Cir. 1987) 20

Painewebber, Inc. v. Faragalli,
61 F.3d 1063 (3d Cir. 1995) 19

Price v. Drexel Burnham Lambert, Inc.,
791 F.2d 1156 (5th Cir. 1986) 19

Ritzel Communications, Inc. v.
Mid-American Cellular Telephone Co.,
989 F.2d 966 (8th Cir. 1993) 20

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 15, 24

Rush v. Oppenheimer & Co.,
779 F.2d 885 (2nd Cir. 1985) 19

S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc.,
906 F.2d 1507 (11th Cir. 1990) 20

Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
807 F.2d 16 (1st Cir. 1986) 19

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220 (1987) 16, 24

Southland Corporation v. Keating,
465 U.S. 1 (1984) 26

St. Mary's Med. Cr. Of Evansville, Inc. v.
Disco Aluminum Prods. Co., Inc.,
969 F.2d 585 (7th Cir. 1992) 10, 11, 21, 23

Stifel, Nicolous & Co., v. Freeman,
924 F.2d 157 (8th Cir. 1991) 16, 17, 20

Volt Information Sciences, Inc. v. Board of Trustees,
489 U.S. 468 (1989) 15, 24

Statutes

9 U.S.C. § 1 15
9 U.S.C. § 2 1
9 U.S.C. § 16(b) 11
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1332(a)(1) 8

PETITION FOR A WRIT OF CERTIORARI

Petitioners Andrew S. Grumhaus ("Drew") and Leslie Grumhaus Davidson ("Leslie") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of a panel of the court of appeals (App., *infra*, 1a-11a) is reported at 223 F.3d 648 (7th Cir. 2000). The order of the court of appeals denying rehearing and rehearing *en banc* (App., *infra*, 26a-27a) is not reported. The opinion of the district court (App., *infra*, at 12a-23a) is not reported, but is available on Westlaw at 1999 WL 1080593.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2000. App., *infra*, 1a. A timely petition for rehearing was denied on September 7, 2000. App., *infra*, 26a-27a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

STATUTE INVOLVED

9 U.S.C. § 2 provides:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof,

> or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Drew and Leslie seek redress from Respondent Comerica Securities, Inc. ("Comerica") for what they contend to be a wrongful and unauthorized liquidation of their securities, in violation of the federal and state securities laws, common law and the rules of the National Association of Securities Dealers, Inc. ("NASD"). After initially naming Comerica as one of several defendants to a state court lawsuit, but prior to Comerica having filed or served any pleadings or discovery (other than a request for a more definite statement), Drew and Leslie (i) nonsuited Comerica from the litigation, and (ii) initiated an arbitration against Comerica--an NASD member--under the NASD rules. Notwithstanding its status as an NASD member, and notwithstanding a mandatory arbitration clause contained in its standard account opening documentation, Comerica objected to the arbitral forum. Specifically, Comerica asserted that Drew and Leslie had waived the right to arbitrate with Comerica by virtue of the state court filing. Comerica therefore refused to participate in an arbitration sanctioned by its own account opening documentation, and sought to intervene in the state court action from which it had previously been nonsuited.

In response to this position, Drew and Leslie commenced an action in federal district court, seeking to compel Comerica to participate in the arbitration, and to enjoin Comerica from further interference with their arbitral rights. The district court granted the requested relief in its entirety, and entered a judgment compelling Comerica to arbitrate. App., *infra*, 24a-25a. Comerica then appealed to the Seventh Circuit. While acknowledging the lack of prejudice to Comerica from participating in the arbitration, the Seventh Circuit nevertheless held that Drew and Leslie had waived their right to arbitration by litigating in state court, and reversed the district court's judgment compelling arbitration. App., *infra*, 11a.

Eight federal circuit courts have held that, without prejudice to the party opposing arbitration, there can be no arbitral waiver. By finding a waiver of arbitration in the absence of prejudice to Comerica, the Seventh Circuit reaffirmed a position which has been adopted by two other federal circuits: prejudice is simply one factor in the waiver equation, and may be ignored depending upon other factors. This minority viewpoint squarely conflicts with the majority rule followed in eight other circuits, as well as the strong national policy favoring arbitration set forth in the Federal Arbitration Act and the precedents of this Court. Further review of this case is warranted to resolve this clear split of authority among the circuit courts, and to vindicate the strong federal policy in favor of arbitration.

A. Factual Background

On or about July 7, 1994, Comerica purported to open a customer account for Drew (the "Drew Account"). (R.1,

¶ 11).[1] Andrew never signed the account application used for this purpose, however, and the signature on this document purporting to be his is a forgery. (R.1, ¶ 11, Ex. A; R.9, ¶ 3). Comerica also purported to open a customer account for Leslie (the "Leslie Account") on or about September 23, 1994. (R.1, ¶ 12). Although Leslie recognizes the signature on the account application to be her own, she does not recall ever having reviewed or completed the form. (R.1, ¶ 12, Ex. B; R.10, ¶ 3). Rather, she believes someone else completed the form after she affixed her signature. (R.1, ¶ 12; R.10, ¶ 3).

As of July 1, 1994, Drew owned 34,457 shares of Dean Foods common stock (hereinafter, the "Drew Stock"), and Leslie owned 10,000 shares of Dean Foods common stock (hereinafter, the "Leslie Stock"). (R.1, ¶ 13). Between July and November of 1994, the Drew Stock was deposited in the Drew Account and sold by Comerica. (R.1, ¶ 14). Also during this time, the Leslie Stock was deposited in the Leslie Account and sold by Comerica. (R.1, ¶ 14).

These transactions were effected at the request of Comerica's then affiliate, Comerica Bank--Illinois, now known as LaSalle Bank--Illinois (*i.e.*, "LaSalle"). (R.1, ¶ 15). The $1,257,653.89 in proceeds generated from these sales transactions were remitted to LaSalle. (R.1, ¶ 15). In turn, LaSalle used the proceeds to pay down substantial loans made to the plaintiffs' father and to their father's affiliates. (R.1, ¶ 15). Neither plaintiff ever received any of the sales transaction proceeds, nor did they ever authorize or have

---

[1] All record citations are made with reference to the Record on Appeal to the United States Court of Appeals for the Seventh Circuit.

notice of these transactions. (R.1, ¶¶ 15-16; R.9, ¶ 2; R.10, ¶ 2).

The account opening documentation used by Comerica to set up both the Andrew Account and the Leslie Account contains the following language concerning arbitration:

> [t]he customer agrees, and by carrying an account for the customer, broker agrees that all controversies which may arise between us concerning any transaction of the construction, performance or breach of this or any other agreement between us pertaining to securities and other property, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be determined pursuant to the Federal Arbitration Act and the laws of the state, before the New York Stock Exchange, Inc., or any arbitration facility provided by any other exchange of which the broker is a member, or the National Association of Securities Dealers, Inc., or the Municipal Securities Rulemaking Board, and in accordance with the rules then prevailing at the selected organization.

(R.1, ¶ 23, Exs. A and B). At all relevant times, Comerica was and is a member of the NASD. (R.1, ¶ 24).

B. The State Court Litigation

On October 7, 1997, Drew and Leslie filed a Complaint in the Circuit Court of Cook County, Illinois against numerous defendants, including Comerica, alleging

claims against each defendant for conversion, unjust enrichment, constructive fraud and constructive trust arising out of the wrongful liquidation of the plaintiffs' securities by one or more of certain named defendants. (R.11, ¶¶ 3-4, Ex. A). The complaint did not assert claims under federal and state securities laws or the NASD rules. Comerica entered its appearance in the state court action on November 17, 1997. (R.11, ¶ 5, Ex. B).

On December 4, 1997, certain defendants, not including Comerica, filed a motion to dismiss the plaintiffs' Complaint. (R.11, ¶ 6; R.22, ¶ 42). Comerica subsequently joined in that motion on January 8, 1998, the same day it also filed a request for a more definite statement in the state court action. (R.11, ¶ 7, Ex. C; R.25, Ex. B). Comerica withdrew its joinder in the motion to dismiss less than two weeks later on January 20, 1998. (R.25, Ex. B).

At the hearing on the motion to dismiss Drew and Leslie's Complaint, counsel for Southwest Securities, Inc., an agent and clearing firm for Comerica, advised the court and the parties of its intention to compel the plaintiffs to arbitrate their claims. (R.11, ¶ 8; R.22, ¶ 44). On March 17, 1998, Judge Neville entered an order (the "Dismissal Order") dismissing the plaintiffs' Complaint without prejudice and granting them leave to replead on or before May 11, 1998. (R.11, ¶ 9, Ex. D; R.22, ¶ 45, Ex. J). The Dismissal Order further provided that "[n]othing contained herein shall waive any party's right (i) to argue that an alleged contractual arbitration clause compels litigation of this case in another tribunal, or (ii) to argue that any such arbitration clause is either inapplicable or unenforceable." (R.11, ¶ 9, Ex. D; R.22, ¶ 45, Ex. J).

On May 26, 1998, Drew and Leslie filed an Amended Complaint in the Circuit Court of Cook County, Illinois against LaSalle Bank-Illinois ("LaSalle"). (R.6, Ex. A; R.23, Ex. A). Drew and Leslie did not amend their Complaint to include any causes of action against Comerica. (R.6, Ex. A; R.23, Ex. A). Rather, Drew and Leslie filed a Notice and Order for Voluntary Dismissal without Prejudice of Certain Defendants in the State Court Case (the "Nonsuit Order") on May 26, 1998, which expressly set forth their intention to commence arbitration proceedings against Comerica. (R.11, ¶ 10, Ex. E; R.22, ¶ 46, Ex. K). Judge Neville entered the Nonsuit Order on May 27, 1998, after providing for the payment of costs to all nonsuited defendants, including Comerica. (R.11, ¶ 10, Ex. E; R.22, ¶ 46, Ex. K). Comerica never objected to the entry of the Nonsuit Order. (R.11, ¶ 10; R.22, ¶46).

C. Drew and Leslie Seek Arbitration

In accordance with the Nonsuit Order, the plaintiffs commenced the Arbitration on November 23, 1998, by filing Uniform Submission Agreements and a Statement of Claim against Comerica with the NASD. (R.1, ¶ 17, Ex. C; R.11, ¶ 11; R.22, ¶¶ 17, 47, Ex. C). Drew and Leslie alleged in their Statement of Claim that Comerica's wrongful liquidation and disposal of the plaintiffs' proceeds, without authorization, constituted negligence, breach of fiduciary duty, and unauthorized trading in violation of the antifraud provisions of the Securities Exchange Act of 1934, the Illinois Securities Law of 1953 and Comerica's obligations under the NASD rules. (R.11, ¶ 12; R.22, ¶¶ 17, 47, Ex. C).

On February 11, 1999, counsel for Comerica advised the NASD that Comerica disputed its obligation to arbitrate the plaintiffs' claims and, thus, was initiating an action in the

Circuit Court of Cook County, Illinois, seeking a judicial declaration to the same. (R.1, ¶ 19, Ex. E; R.11, ¶ 13; R.22, ¶ 19, Ex. E). Counsel for Comerica further advised the NASD that Comerica would neither respond to the plaintiffs' arbitration demand or submit a Uniform Submission Agreement. (R.1, ¶ 19, Ex. E; R.22, ¶ 19, Ex. E). This was the first time Comerica had objected to the Arbitration. (R.11, ¶ 14).

Comerica filed a petition in Drew and Leslie's state court action against LaSalle on February 17, 1999, seeking leave to intervene in that action and to file a four-count Counterclaim against the plaintiffs seeking, *inter alia*, to enjoin further prosecution of the Arbitration. (R.1, ¶ 20; R.12, p. 4; R.22, ¶ 20). On March 15, 1999, following a hearing on Comerica's petition, Judge Neville rejected Comerica's request to intervene. (R.1, ¶ 21; R.12, p. 4; R.22, ¶ 21).

D. Proceedings in the District Court

On March 18, 1999, Drew and Leslie filed their Complaint to Compel Arbitration against Comerica in the district court below. (R.1). Drew and Leslie pleaded the presence of diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). Comerica answered the Complaint to Compel Arbitration on April 23, 1999, the substance of which included an affirmative defense alleging the plaintiffs "waived" their right to arbitration by originally filing an action against Comerica in state court. (R.6).

On May 11, 1999, and with leave of court, the plaintiffs filed their First Amended Complaint to Compel Arbitration, which sought to not only compel arbitration, but to enjoin Comerica from further interference with the

arbitration process. (R.18; R.22). Comerica answered the First Amended Complaint to Compel Arbitration on May 25, 1999. (R.23).

On July 7, 1999, and again with leave of court, the plaintiffs filed their Second Amended Complaint to Compel Arbitration. (R.27; R.28). This second amended complaint added claims against Comerica for negligence, breach of fiduciary duty, and violations of the Securities Exchange Act of 1934 and the Illinois Securities Act of 1953. (R.28).

On November 23, 1999, the district court entered judgment in favor of Drew and Leslie, on the claims to compel arbitration and for preliminary and permanent injunctions. App., *infra*, 24a-25a. Examining the totality of the circumstances, the district court found that Drew and Leslie had not waived their right to arbitrate their dispute. App., *infra*, 18a-23a. In its Memorandum and Order, the district court first noted that the issues raised in the state court complaint were different from those raised in the arbitration demand. App., *infra*, at 19a-20a. Moreover, the court specifically found that "the diligence of [Drew and Leslie] in seeking arbitration early in the process and before Comerica had become significantly involved in the state court litigation weighs heavily in favor of our finding that [Drew and Leslie] have not waived their right to arbitrate." App., *infra*, 20a. The court continued:

> [Drew and Leslie]'s state court litigation against Comerica was brief and minimal. In short order, plaintiffs filed a complaint, responded to Comerica's bill of particulars, and then obtained a non-suit order voluntarily dismissing their claims against Comerica. Unlike the defendant in *St. Mary's Med. Cr.*

> *Of Evansville, Inc. v. Disco Aluminum Prods. Co., Inc.*, 969 F.2d 585, 589 (7th Cir. 1992), who was found to have waived its right to arbitrate, plaintiffs in this case did not file a motion to dismiss, but merely responded to one. [FN5] Furthermore, no discovery was conducted with respect to Comerica. The skeletal nature of the state court litigation militates against a finding of waiver here. FN. 5—Notably, Comerica did not join in the motion to dismiss filed in the state court proceeding.

App., *infra*, 20a-21a (additional internal citations omitted). Finally, while recognizing the Seventh Circuit's view that absence of prejudice was not dispositive, the district court held that:

> [T]he absence of any prejudice to Comerica from arbitrating its dispute with [Drew and Leslie] strongly supports sending this case to arbitration. Comerica should have known since March 1988 that arbitration was a possible cause of action, and has known since May 1988 that [Drew and Leslie] intended to pursue arbitration of its [sic] dispute. Comerica did not contest [Drew and Leslie]'s right to arbitrate until February 1999, when it responded to the NASD's notice of [Drew and Leslie]'s arbitration claim against it. Comerica cannot, and does not, attempt to argue that it was surprised when [Drew and Leslie] filed for arbitration or that its claims and defenses will be adversely affected if required to arbitrate

this dispute. Comerica will suffer no prejudice from an order compelling arbitration.

App., *infra*, 21a-22a.

Comerica appealed.

E. Proceedings in the Seventh Circuit

1. Jurisdiction

As a threshold issue, Drew and Leslie argued that the Court of Appeals lacked jurisdiction to review the district court's order. Under the established law of the Seventh Circuit, an order compelling arbitration is non-final and non-appealable if entered in a proceeding where the question of arbitrability is "embedded" with substantive claims. *See Napleton v. General Motors Corp.*, 138 F.3d 1209, 1210-1214 (7th Cir. 1998); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 507-8 (7th Cir. 1999); *see also* 9 U.S.C. § 16(b) (absent a § 1292(b) finding by the district court, various pro-arbitration rulings are interlocutory and non appealable). Here, as amended, Drew and Leslie's complaint stated common-law claims against Comerica for negligence and breach of fiduciary duty, as well as claims arising under state and federal securities laws. Accordingly, Drew and Leslie argued that the case below was an "embedded" proceeding and that the court of appeals lacked jurisdiction to review the district court's order.

2. Waiver and Prejudice

In its appellate briefs, Comerica argued that the district court should not have considered whether Comerica had been prejudiced by Drew and Leslie's decision to arbitrate. Brief of

Defendant--Appellant Comerica Securities, Inc., 17; Reply Brief of Defendant--Appellant Comerica Securities, Inc., 8 (hereinafter, the "Comerica Reply Brief"). Comerica further characterized recent Seventh Circuit precedent as stating plainly that "where it is clear that a party has foregone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party." Comerica Reply Brief, 8, *citing St. Mary's Medical Center v. Disco Aluminum Products Co.*, 969 F.2d 585, 590 (7th Cir. 1992); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).

3. The Seventh Circuit's Decision

The court of appeals reversed the district court's judgment compelling arbitration. First, the court found that it had jurisdiction to hear Comerica's appeal. App., *infra*, 4a. The court acknowledged the general proposition that an order compelling arbitration cannot be appealed if it is part of a larger suit before the district court. *Id.* However, the court concluded that Drew and Leslie's motion to compel arbitration was the "sole issue before the court," and not part of an "embedded" proceeding. App., *infra*, 5a. The Seventh Circuit therefore concluded that appellate jurisdiction was present.

Turning to the merits of the case, the court of appeals held that Drew and Leslie had waived their right to arbitrate their dispute. App., *infra*, 11a. The court did concede that "Comerica was not unduly prejudiced by [Drew and Leslie's] delay in seeking arbitration[2]." *Id.* Nevertheless, the court

---

[2] The court also asserted, without citation to the record, that "the Grumhaus children did not do all they reasonably should have been expected to do to make the earliest feasible determination" of which

held that (i) Drew and Leslie's filing of an action in state court, by itself, triggered a presumption that they had waived their right to arbitrate, and (ii) no "special circumstances" existed sufficient to relieve Drew and Leslie from such waiver. *Id.* App., *infra*, 5a-11a. Ultimately, the court held, "[w]hen the Grumhaus children chose to file suit against Comerica over the wrongful liquidation of their assets, they waived their right to have an arbitrator resolve that dispute." App., *infra*, 10a.

---

forum to elect. App., *infra*, 11a (citations omitted).

REASONS FOR GRANTING THE WRIT

This case highlights a clear split of authority among the federal circuits regarding the circumstances required to justify a finding that a party has waived its right to arbitration. Mindful of this Court's recognition of a national policy favoring arbitration, eight courts of appeals hold that waiver will not be found in the absence of prejudice to the party opposing arbitration. Three courts of appeals, however, (notably including the Seventh Circuit) have taken a much narrower view of this national policy. These courts hold that waiver may be found far more readily, even in circumstances in which the objecting party has clearly not been prejudiced.

This conflict in the circuits has important consequences for the continued availability of arbitration as a favored form of alternative dispute resolution. By de-emphasizing the significance of prejudice in the analysis of arbitral waiver, the minority viewpoint undermines this Court's well-established command that all doubts as to waiver should be resolved in favor of arbitration. In its recent decisions, including the case below, the Seventh Circuit has taken this minority viewpoint even further--holding that the filing of a lawsuit in a non-arbitral forum creates a **presumption** of waiver, and that such presumption can only be rebutted in extraordinary circumstances. In so ruling, the Seventh Circuit has adopted a radically expansive view of arbitral waiver--one without foundation in the Federal Arbitration Act or the precedent of this Court. The Seventh Circuit's ruling in the case below underlines the importance of resolving the contours of the arbitral waiver doctrine once and for all. The petition should be granted.

I. THE COURTS OF APPEALS ARE IN SUBSTANTIAL CONFLICT AS TO THE SIGNIFICANCE OF PREJUDICE IN AN ANALYSIS OF ARBITRAL WAIVER.

A. The Majority Viewpoint

When Congress enacted the Federal Arbitration Act, it expressed a clear national policy in favor of arbitration as a tool for the resolution of disputes. *See* 9 U.S.C. § 1, *et seq.* Indeed this court has emphatically stated that:

> [T]he Courts of Appeals have consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, **as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is** the construction of the contract language itself or **an allegation of waiver**, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 24-25 (1983) (emphasis added). Moreover, in case after case, this Court has reaffirmed the vitality of the policy in favor of arbitration. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors,*

Corp. v. Soler Chrylser-Plymouth, Inc., 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

A majority of the courts of appeals have construed this policy as prohibiting courts from finding a waiver of the right to arbitrate in the absence of prejudice to the objecting party. In *Stifel, Nicolous & Co., v. Freeman*, 924 F.2d 157, 158 (8th Cir. 1991), for example, the plaintiff securities firm ("Stifel") filed a diversity action in November 1987 against two of its customers, seeking to recover outstanding debit balances in their accounts. In February 1988, the defendants filed counterclaims alleging that Stifel had violated certain securities laws. Instead of immediately asserting its right to arbitration, Stifel replied to the counterclaim and proceeded with written discovery. Thereafter, however, in May 1998, Stifel moved to compel arbitration of the entire lawsuit. The district court granted Stifel's motion and dismissed the underlying suit without prejudice. The defendants appealed.

The Eighth Circuit affirmed. In so doing, the court adopted the Ninth Circuit's three-part test for evaluating claims of arbitral waiver. The court held: "To prove that Stifel waived its right to arbitration, [the defendants] must show: (1) Stifel knew of an existing right to arbitration; (2) Stifel acted inconsistently with that right; and (3) **Stifel's inconsistent act prejudiced them**." *Stifel*, 924 F.2d at 158 (emphasis added), citing *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Applying that test to the case before it, the court noted that it was undisputed that Stifel knew of its right to arbitrate. Moreover, the court held that Stifel had indeed acted inconsistently with its right to arbitrate by initiating litigation and by participating in discovery on arbitrable claims. Nevertheless, even though **Stifel** had been the first to file suit, the court refused to find a waiver. The court explained: "In our view, the fact that Stifel initiated

litigation to recover debit balances and waited three months after [the defendants] filed their amended counterclaim for violations of federal securities laws before moving to compel arbitration did not prejudice [the defendants]." *Stifel*, 924 F.2d at 159.

The Fourth Circuit has likewise focused on prejudice to the objecting party in its discussions of arbitral waiver. In *Fraser v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987), the Court of Appeals held:

> "A litigant may waive its right to invoke the Federal Arbitration Act by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." **The dispositive question is whether the party objecting to arbitration has suffered actual prejudice**. Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration.

(emphasis added, internal citations omitted), *quoting Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981-82 (4th Cir. 1985); *see also Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 330 (4th Cir. 1971); *quoting Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer*, 311 F.Supp. 68, 77 (D. S.C. 1970) ("The modern rule, though, based on a liberal national policy favoring arbitration, seems to be that waiver or 'default' under the [Arbitration Act] may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party"). In *Fraser*, the court found a waiver of the right to arbitrate only after

noting that: 1) the objecting party had been required to respond to several potentially damaging motions, including a motion for partial summary judgment and three motions to dismiss; 2) partial summary judgment had, in fact, been granted against the objecting party; 3) two trial dates had passed prior to the hearing on the motion to compel arbitration; and 4) discovery had proceeded for four years before the defendant moved to compel arbitration. 817 F.2d at 252.

Similarly, in *Gavlik Construction Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3rd Cir. 1975), the Third Circuit found that substantial litigation activity could not, in the absence of prejudice to the objecting party, constitute a waiver of the right to arbitrate. There, plaintiff Gavlik commenced an action in Pennsylvania state court on May 1, 1974 against defendant Campbell for breach of contract. On June 20, 1974, Campbell filed a petition to remove the action to federal court and, at the same time, moved for a stay of proceedings in the district court pending arbitration. On July 1, 1974, Campbell moved to consolidate the Gavlik suit with another suit brought against it by Harry Dunn Company. On July 2, 1974, Campbell filed a third-party complaint in the Gavlik action against The Wickes Corp. One day later, Campbell moved for a stay of all proceedings with respect to the third-party defendant Wickes, pending arbitration.

On July 16, 1974, Gavlik moved to dismiss Campbell's motion for a stay of proceedings and to require Campbell to answer its complaint. Campbell, on November 18, 1974, amended its motions for stays and specifically requested an order compelling Gavlik and Wickes to submit to a consolidated arbitration. Gavlik moved to dismiss Campbell's motion. On September 2, 1975, the district court

entered an order which, *inter alia*, granted a stay of proceedings and ordered Gavlik to arbitrate.

Gavlik appealed, arguing that Campbell had waived its right to arbitrate when it filed a third-party complaint against Wickes and then moved to consolidate the Gavlik and Dunn actions. The Third Circuit affirmed. In so doing, the court noted that Gavlik had not been prejudiced by Campbell's actions in filing the third-party complaint and moving to consolidate. The court reasoned, "We believe it is not the inconsistency of a party's actions, 'but the presence of prejudice which is determinative of the issue' of waiver." 526 F.2d at 783, *quoting Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2nd Cir. 1968).

A review of the case law in this area reveals that a majority of federal circuits view prejudice as the *sine qua non* of arbitral waiver. *See, e.g., Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 807 F.2d 16, 19 (1st Cir. 1986); *Commercial Union Ins. Co. v. Gilbane Building Co.*, 992 F.2d 386, 390 (1st Cir. 1993); *Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 221 (1st Cir. 1995); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2nd Cir. 1985); *Kramer v. Hammond*, 943 F.2d 176, 179 (2nd Cir. 1991); *Gavlik Construction Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3rd Cir. 1975); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 925 (3d Cir. 1992); *Painewebber, Inc. v. Faragalli*, 61 F.3d 1063, 1069 (3d Cir. 1995); *Fraser v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987); *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981-82 (4th Cir. 1985); *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 330 (4th Cir. 1971); *Miller Brewing Co. v. Fort Worth Distributing Co., Inc.*, 781 F.2d 494, 497 (5th Cir. 1986); *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1161

(5th Cir. 1986); *Frye v. Paine, Webber, Jackson & Curtis, Inc.*, 877 F.2d 396, 399 (5th Cir. 1989); *Stifel, Nicolous & Co., v. Freeman*, 924 F.2d 157, 158 (8th Cir. 1991); *Ritzel Communications, Inc. v. Mid-American Cellular Telephone Co.*, 989 F.2d 966, 969 (8th Cir. 1993); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986); *Hoffman Construction Co. of Oregon v. Active Erectors and Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992); and *S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990). In each of these circuits, courts have refused to find that a party has waived its right to arbitrate unless the objecting party would suffer some prejudice occasioned by the delay in seeking arbitration.

B. The Minority Viewpoint

In sharp contrast, a minority of federal circuits have held that a showing of prejudice is **not** required in order to find a waiver of arbitration. In *National Foundation for Cancer Research v. A.G. Edwards & Sons*, 821 F.2d 772, 774 (D.C. Cir. 1987), the court held that "[t]he essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with its arbitration right." Moreover, the court expressly rejected the majority view of arbitral waiver, holding "[t]his circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right of arbitration. We decline to adopt such a rule today." *Id.* at 777 (internal citations omitted). Similarly, the Tenth Circuit's test considers prejudice as but one of six factors relevant to its waiver analysis, holding:

> In determining whether a party has waived its right to arbitration, we examine the following factors:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration or enforcement close to the trial date or delayed a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without first asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party.

Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1489 (10th Cir. 1994).

C. The Seventh Circuit

Of all the circuits espousing the minority view, however, the Seventh has displayed the most consistent voice in favor of finding arbitral waiver even without prejudice, and the most expansive view of when waiver has occurred. In *Midwest Window Systems, Inc. v. Amcor Industries, Inc.*,, 630 F.2d 535, 537 (7th Cir. 1980), the court opined that "[a]ll of the circumstances, of which prejudice should be one, must be considered in the context of the particular case." Likewise, in *St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Co., Inc.*, 969 F.2d 585, 587-88, the court held that "[n]o rigid rule exists as to what constitutes a

waiver of the right to arbitrate.... The essential question is whether, based on the circumstances, the party has acted inconsistently with the right to arbitrate." [3]

In the case of *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995), the Seventh Circuit further diminished the role of prejudice in the waiver analysis. Specifically, the court held that "[t]o establish a waiver of the contractual right to arbitrate, a party need not show that it would be prejudiced if the stay were granted and arbitration ensued." *Id.* at 390. The court continued, however, and lowered the bar of arbitral waiver even further, holding:

> Today we take the next step in the evolution of doctrine and hold that an election to proceed before a nonarbitrable tribunal for the resolution of a contractual dispute is a **presumptive waiver** of the right to arbitrate. Although not compelled by our previous cases, this presumption is consistent with them; for we have deemed an election to proceed in court a waiver of a contractual right to arbitrate, without insisting on evidence of prejudice beyond what is inherent in an effort to change forums in the middle (and it needn't be the exact middle) of a litigation.

Id. (emphasis added).

---

[3] Contrast *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975), ("We believe it is not the inconsistency of a party's actions, but the presence or absence of prejudice which is determinative of the issue of waiver").

In the proceedings below, the Seventh Circuit relied on several of its earlier cases on arbitral waiver, including *Cabinetree*, to hold that Drew and Leslie had waived their right to arbitrate once they initiated litigation in state court. The court explained:

> A court **must presume** that a court that a party implicitly waived its right to arbitrate when it chooses a judicial forum for the resolution of a dispute. *See Cabinetree*, 50 F.3d at 390. Once a party selects a forum, the courts have an interest in enforcing that choice and not allowing parties to change course midstream. *See id.* The central question is whether the party against whom the waiver is to be found intended its selection and **not whether either party would be prejudiced by the forum change**. *See id.* In the case of an implied waiver, we must determine whether "based on all the circumstances, the [party against whom the waiver is to be enforced] has acted inconsistently with the right to arbitrate." *St. Mary's*, 969 F.2d at 588; *see also Iowa Grain*, 171 F.3d at 510 (holding that courts must look at the totality of the circumstances to find waiver).

App., *infra*, 5a-6a (emphasis added). Because Drew and Leslie had initially named Comerica as a defendant in the state court litigation, the *Cabinetree* decision's presumption was triggered. In addition, the court found no "special circumstances" sufficient to overcome the presumption of waiver. The Seventh Circuit did not dispute the district court's finding of no prejudice, and itself acknowledged that "Comerica was not unduly prejudiced by [Drew and Leslie's]

delay in seeking arbitration." App., *infra*, 11a. Nevertheless, the court held that lack of prejudice was not sufficient to overcome the presumptive waiver. *Id.*

II. THE ISSUE OF ARBITRAL WAIVER IS FREQUENTLY LITIGATED, AND OF GREAT SIGNIFICANCE TO THE AVAILABILITY OF ARBITRATION AS AN ALTERNATIVE FORM OF DISPUTE RESOLUTION.

As confirmed by the course of the case below, as well as the numerous cases cited herein, the issue of arbitral waiver arises often in the course of litigation under the Federal Arbitration Act. Moreover, because a finding of waiver effectively terminates a party's right to arbitrate, the issue of arbitral waiver always has the potential to be outcome determinative. It thus follows that the law of arbitral waiver is a crucial component of the jurisprudence implementing and interpreting the Federal Arbitration Act. The broader a view of waiver taken by the trial court (and reviewing courts), the less available the arbitral remedy will be.

This Court has repeatedly endorsed the concept of a national policy favoring arbitration. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors, Corp. v. Soler Chrylser-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). This national policy is jeopardized by the present conflict in the courts of appeals on the issue of arbitral waiver. Based on the decisions cited herein, it appears plain that the judgment compelling Comerica to arbitrate with Drew and Leslie would

have been affirmed in the First, Second, Third, Fourth, Fifth, Eighth, Ninth and Eleventh Circuits. Yet, this judgment was reversed in the Seventh Circuit, and could possibly have met a similar fate in the Tenth and D.C. Circuits.[4] If the policy favoring arbitration is to be truly a **national** one, this uncertainty should not prevail. And if arbitral waiver can be found in a case without prejudice to the objecting party, the favorable status afforded to arbitration is illusory.

III. THE SEVENTH CIRCUIT'S APPROACH TO ARBITRAL WAIVER CANNOT BE SQUARED WITH EITHER THE NATIONAL POLICY FAVORING ARBITRATION OR THE PRECEDENTS OF THIS COURT.

The Seventh Circuit's analysis of arbitral waiver conflicts not only with the law of eight other circuit courts of appeals, but with the national policy favoring arbitration, as articulated by numerous precedents of this Court. In the *Cabinetree* case, the Seventh Circuit explained the rationale for its analysis as follows:

> [i]n determining whether a waiver has occurred, the court is not to place its thumb on the scales; the federal policy favoring arbitration is, at least so far as concerns the interpretation of an arbitration clause, merely a policy of treating such clauses no less hospitably than other contractual provisions. To establish a waiver of the contractual right to arbitrate, a party need not show that it would

[4] Drew and Leslie continue to believe that a finding of waiver in their case was unwarranted, regardless of whether prejudice is factored into the equation.

> be prejudiced if the stay were granted and arbitration ensued.
>
> . . . . . .
>
> An arbitration clause gives either party the choice of an alternative, nonjudicial forum in which to seek a resolution of a dispute arising out of the contract. But the intention behind such clauses, and the reason for judicial enforcement of them, are not to allow or encourage the parties to proceed, either simultaneously or sequentially, in multiple forums.

Cabinetree, 50 F.3d at 390.

This rationale apparently ignores this Court's command to resolve any doubts of arbitrability and waiver in favor of arbitration. *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25; *see also Southland Corporation v. Keating*, 465 U.S. 1, 13 (1984), *citing Metro Industrial Painting Corp. v. Terminal Construction Corp.*, 287 F.2d 382, 387 (2nd Cir. 1961) ("the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures").

The Seventh Circuit's concern about arbitration and litigation proceeding in multiple fora is likewise inconsistent with the precedent of this Court. In *Dean Witter Reynolds, Inc. v. Byrd*, this Court held that the Federal Arbitration Act required arbitration of pendent arbitrable claims, "even where the result would be the possible inefficient maintenance of separate proceedings in different forums." 470 U.S. 213,

217. In so holding, the Court emphasized that efficiency concerns must yield to the command of Congress to enforce arbitration agreements:

> [w]e therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act--enforcement of private agreements and encouragement of efficient and speedy dispute resolution--must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute.

Dean Witter Reynolds, 470 U.S. at 221.

This Court has clearly interpreted the Federal Arbitration Act to require the enforcement of valid contracts to arbitrate, even where such enforcement results in simultaneous litigation in separate fora. In its decisions in *Cabinetree* and the case below, the Seventh Circuit has clearly taken a different tack. Rather than focusing on the prejudice (or lack thereof) to the objecting party, the Seventh Circuit emphasizes the initial "selection of the forum." *See Cabinetree*, 50 F.3d at 390.

In so doing, the Seventh Circuit reverses the burden of proof associated with waiver issues in other circuits. *See, e.g., Fisher v. A.G. Becker Paribas Incorporation*, 791 F.2d 691, 694 (9th Cir. 1986), *citing Belke v. Merrill Lynch,*

Pierce, Fenner & Smith, 693 F.2d 1023, 1025 (11th Cir. 1982); *Brown v. E.F. Hutton & Co., Inc.*, 610 F. Supp. 76, 79 (S.D. Fla. 1985) ("[b]ecause waiver of the right to arbitration is disfavored, "any party arguing waiver of arbitration bears a heavy burden of proof"). Comerica--the party challenging arbitration--is relieved of the heavy burden associated with proving a waiver of arbitral rights. Instead, Drew and Leslie--the parties seeking to arbitrate--are charged with demonstrating "special circumstances" sufficient for the purpose of "absolving them of their waiver." App., *infra*, 10a-11a.

As a result of the application of this standard to the case below, Comerica has been permitted to avoid arbitration. Moreover, as of the present date, Comerica has successfully avoided a forum--the NASD--**selected in its own account opening documentation**.[5] *Compare Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (construing terms of arbitration clause contained in account opening agreement against securities brokerage that drafted such clause). And the parties have now been litigating the question of arbitrability for more than a year and a half--far longer than the six months Comerica was a party to the state court litigation. Clearly, the standard followed by the Seventh Circuit has neither promoted the most efficient outcome of the dispute between the parties, nor vindicated the national policy favoring arbitration.

---

[5] Presumably, Comerica does not hesitate to compel its customers to arbitrate in this forum when it suits Comerica's tactical purposes to do so.

IV. THE SEVENTH CIRCUIT LACKED APPELLATE JURISDICTION OVER THE CASE BELOW.

In the case below, the Seventh Circuit held that the entry of a final judgment and dismissal of the underlying case were dispositive of the jurisdictional issue. App., *infra*, 4a-5a. Because nothing further remained to be done in the district court, the Seventh Circuit concluded that the district court's judgment was a "final order from which appeal can be taken." *Id.* at 5a. In so ruling, the Seventh Circuit departed from prior circuit authority, which holds that "it is the nature of the underlying action, not the style of the district court's decision requiring arbitration, that determines whether we have jurisdiction over appeals from decisions granting arbitration." *Napleton*, 138 F.3d at 1209. Because Drew and Leslie's complaint was amended to state substantive claims against Comerica, the underlying proceeding was embedded, and the Seventh Circuit lacked appellate jurisdiction.

CONCLUSION

Both the district court and the court of appeals agreed that Comerica was not unduly prejudiced by the conduct of Drew and Leslie's litigation. In the clear majority of federal courts, that fact would have been determinative, and would have required the court of appeals to affirm the district court and allow arbitration to proceed. Under the expansive view of arbitral waiver taken by the Seventh Circuit, however, Drew and Leslie's brief foray into state court effectively ended the inquiry and caused them to forfeit their chance to arbitrate their dispute.

The need for judicial guidance from this Court is acute. Despite considerable attention at lower levels of the

judiciary over the past two decades, the federal courts have been unable to reach a consensus regarding the standard applicable to claims of arbitral waiver. By granting further review of this matter, this Court can resolve the clear split of authority on this issue of exceptional national importance, and can reaffirm the strong national policy in favor of arbitration. As an additional reason for granting review, this court should review this case in order to clarify that an order compelling arbitration which arises in the context of a case seeking substantive relief is non-final and non-appealable. Drew and Leslie respectfully request that their petition for a writ of certiorari be granted.

/s/_____

Robert P. Bramnik
Counsel of Record
Jonathan W. Young
Thomas I. Matyas
Christopher M. Kanis
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive,
Suite 3000
Chicago, Illinois 60606-1229
(312) 201-2000

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Decided August 3, 2000]

No. 99-4238

ANDREW S. GRUMHAUS and LESLIE GRUMHAUS-DAVIDSON,
Plaintiffs-Appellees,

v.

COMERICA SECURITIES, INC., as successor-in-interest to Comerica Financial Services, Inc.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99 C 1776 -- James B. Moran, Judge

Argued May 30, 2000

Before POSNER, COFFEY and KANNE, *Circuit Judges*.

OPINION

KANNE, *Circuit Judge*. A year after Andrew S. Grumhaus and Leslie Grumhaus Davidson ("the Grumhaus children") sued Comerica Securities in state court and nearly six months after the case was dismissed, they demanded a chance to arbitrate the dispute. Comerica resisted arbitration on the ground that the contractual right to arbitrate had been waived. The Grumhaus children moved to compel arbitration, and the district court ruled that the Grumhaus children had not waived arbitration and entered an order to compel. We find that no special circumstances absolve the Grumhaus children from the effect of their waiver of the right to arbitrate, and we vacate the district court's order.

I. HISTORY

Peter Dean Grumhaus, Sr., the Grumhaus children's father, had borrowed heavily from LaSalle Bank on his own behalf and for several businesses he either owned or controlled. After some financial setbacks, Grumhaus found himself strapped for cash to pay off the loans. The Grumhaus children owned large blocks of stock in Dean Foods, a company that the family had controlled for many years, and Grumhaus decided to use this stock to pay back LaSalle Bank. To do so, Grumhaus needed to establish accounts with a securities trading firm and liquidate the Dean Foods stock that was in his children's names. The Grumhaus children signed the papers establishing the brokerage accounts, and LaSalle presented those papers to Comerica, a securities firm affiliated with LaSalle. The children never agreed to sell their stock, and Grumhaus apparently forged his children's signatures on the loan applications pledging the stock as collateral and on

the orders to sell the stock. The stock was sold in 1994 and the proceeds used to pay off the LaSalle loans. Two years later, after Grumhaus died, his children discovered their stock had been sold.

In October 1997, the Grumhaus children sued Comerica, LaSalle and another brokerage firm in Illinois state court. That complaint stated several claims "collectively against the defendants" revolving around the unauthorized sale of the children's stock by Comerica to pay off the LaSalle loans. The complaint sought damages equal to the present value of the stock and the establishment of a constructive trust for the proceeds of the sale. LaSalle moved to dismiss the case, and on March 17, 1998, the state court dismissed the complaint against all defendants, with leave to refile. In its order, the court stated that "[n]othing contained herein shall waive any party's right (i) to argue that an alleged contractual arbitration clause compels litigation of this case in another tribunal, or (ii) to argue that any such arbitration clause is either inapplicable or unenforceable." Two months later, the Grumhaus children refiled their complaint against LaSalle, but voluntarily dismissed without prejudice their claims against Comerica. In their voluntary dismissal, the Grumhaus children expressed an intent to arbitrate the dispute with the brokerage firms.

Six months later, the Grumhaus children filed a demand for arbitration with the National Association of Securities Dealers. That demand alleged that Comerica had wrongfully sold the Dean Foods stock, relying on forged documents supplied by LaSalle, to pay off the LaSalle loans. For damages, the Grumhaus children sought the value of the stock. Comerica refused to enter arbitration.

The federal district court held that the parties had an enforceable arbitration agreement and that the Grumhaus children had not waived that right by litigating in state court. The district court recognized the presumption that a party waives a right to arbitrate by choosing a judicial forum instead of arbitration, but held that the presumption was outweighed by several factors. Among them, the court found that the issues in arbitration were different than those in the state complaint, Comerica had not been prejudiced by the judicial proceeding and that the "skeletal nature" of the proceeding and the court's order had not indicated an intent to waive arbitration.

II. ANALYSIS

We first address whether this Court has jurisdiction to decide this appeal. We find that we do. Under the law of this Circuit, an order to compel arbitration cannot be appealed if it is part of a larger suit still before the district court, or "embedded" among multiple issues. *See Iowa Grain Co. v. Brown*, 171 F.3d 504, 508 (7th Cir. 1999); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998). This Court may hear an appeal from an order in an "independent" proceeding, or one in which the motion to compel arbitration is the "sole issue before the district court." *Iowa Grain*, 171 F.3d at 508. The Grumhaus children contend that their motion is embedded, and therefore the order compelling arbitration cannot be appealed.

The Grumhauses initially filed an independent complaint in the district court to compel arbitration of their dispute. After briefing and while awaiting the court's decision, they filed an amended complaint adding substantive

claims against Comerica in an attempt to transform their arbitration action into an embedded action. All along, they admitted they wanted those substantive claims, which were the same as the claims to be submitted to arbitration, to be arbitrated, not decided by the court. In fact, they asked the court to stay litigation of the amended complaints and not require Comerica to answer it because the court's disposition of the arbitration claim would completely dispose of the substantive claims. The Federal Arbitration Act prohibits only appeals from interlocutory orders to proceed with arbitration, not from final orders. *See* 9 U.S.C. § 16(b)(2). The district court in this case entered a final judgment that indicated "cause dismissed" and ordered the parties to arbitration. No further issues remain for the district court to answer, and so it is clear that the Grumhaus's arbitration motion was the sole issue before the court. Therefore, the court's order constitutes a final order from which appeal can be taken.

We next decide whether the Grumhaus children waived their right to arbitrate the dispute with Comerica. We review a district court's finding of waiver for clear error, but review *de novo* any conclusions of law. *See Iowa Grain*, 171 F.3d at 509. A contractual right to arbitrate may be waived, either expressly or implicitly. *See Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Products Co.*, 969 F.2d 585, 587 (7th Cir. 1992). In fact, we have held that a court must presume that a party implicitly waived its right to arbitrate when it chooses a judicial forum for the resolution of a dispute. *See Cabinetree*, 50 F.3d at 390. Once a party selects a forum, the courts have an interest in enforcing that choice and not allowing parties to

change course midstream. *See id.* The central question is whether the party against whom the waiver is to be found intended its selection and not whether either party would be prejudiced by the forum change. *See id.* In the case of an implied waiver, we must determine whether "based on all the circumstances, the [party against whom the waiver is to be enforced] has acted inconsistently with the right to arbitrate." *St. Mary's*, 969 F.2d at 588; *see also Iowa Grain*, 171 F.3d at 510 (holding that courts must look at totality of the circumstances to find waiver).

In *Cabinetree*, the plaintiff filed a breach of contract suit in state court, and the defendant chose to remove the case to federal court, which had jurisdiction under diversity of citizenship. After six months of pretrial proceedings and discovery, the defendant moved to stay the court action pending arbitration. The district court denied the motion, and the defendant appealed. We held that the election to proceed in a nonarbitral forum acted as a presumptive waiver of the right to arbitrate and that a party need not show that it would be prejudiced if arbitration were compelled. 50 F.3d at 390.

Similarly, in *St. Mary's*, the plaintiff had filed an amended complaint for breach of warranty in federal district court in July 1990. 969 F.2d at 586-87. The defendant waited about five months and then moved for dismissal of the complaint as time barred and, in the alternative, as insufficient as a matter of law. Several more months passed without mention of arbitration, and after the district court finally denied the motion to dismiss, the defendant for the first time moved for a stay pending arbitration. The district court found that the defendant had waived arbitration for three reasons: delay, participation in discovery and filing a motion to

dismiss. We upheld the district court, finding that the defendant's participation in several months of litigation was inconsistent with an intent to exercise an arbitration right. *Id.* at 590-91. "Submitting a case to the district court for decision is not consistent with a desire to arbitrate. A party may not normally submit a claim for resolution in one forum and then, when it is disappointed with the result in that forum, seek another forum." *Id.* at 589. Furthermore, we held that "a court may find waiver even if [the decision to forgo arbitration] did not prejudice the non-defaulting party." *Id.* at 590.

Here, the plaintiffs filed suit against Comerica in October 1997 and litigated their claims for several months. In March 1998, the state court dismissed the complaint. Understandably disappointed with that result, the Grumhaus children decided that they wanted to arbitrate. Still they waited several more months, until more than year after filing the initial action, to demand arbitration formally. The plaintiffs were aware of their right to arbitrate, as it was included in the documents they signed establishing their brokerage accounts, but chose instead to litigate. Just as in *St. Mary's* and *Cabinetree*, this knowing selection of one forum over another and willing participation in the ensuing litigation was plainly inconsistent with a desire to arbitrate.

The Grumhaus children attempt to distinguish *St. Mary's* on the ground that, unlike the defendants in *St. Mary's*, they "never submitted their state court action for judgment." This is not even technically correct. Filing a complaint in district court most certainly constitutes a request for judgment, as the words "prays for entry of judgment" as used repeatedly by the Grumhaus children would tend to

indicate. Although it is true that in *St. Mary's* the defaulting party submitted a motion to dismiss while here the non-defaulting party (Comerica) submitted the motion, that distinction relates solely to the different roles of the parties as plaintiff or defendant. In *St. Mary's*, the issue was whether the defendants had submitted the case for resolution in a judicial forum, a fact indicated by filing a motion to dismiss, while here the issue is whether the plaintiffs had. Unlike a defendant, a plaintiff expresses his intent to submit to a judicial forum by filing a complaint, as the Grumhaus children did. Had Comerica failed to respond at all to the suit, we have no doubt the Grumhaus children would have thought themselves entitled to a default judgment against Comerica. The Grumhaus children having filed a complaint in district court may not now say they did not submit the case for judgment.

The Grumhaus children also contend that waiver cannot be inferred because their state court action against Comerica involved different causes of action than those at issue in their request to arbitrate. In *Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995), we held that a decision to litigate state law breach of contract claims did not evince an intent to waive arbitration of federal Lanham Act claims because the two claims "involved different issues." *See also Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997) ("[O]nly prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate."). *Doctor's Associates* involved claims by franchisees that the franchisor had waived its right to arbitrate disputes under the franchise agreement by litigating eviction proceedings under leases between the franchisor and franchisees. *Id.* The

franchisor sought to enforce rights to payments, royalties and so forth under the franchise agreements through arbitration as allowed by the agreements, but also sought to enforce rights created by the leases through eviction proceedings. The Second Circuit, citing *Gingiss*, 58 F.3d at 330-32, rejected a simple fact-based analysis of whether the defaulting party had waived its right to arbitrate, but looked instead to whether the parties had "litigate[d] substantial issues going to the merits of the franchisees' current claims." *Doctor's Associates*, 107 F.3d at 133. The court found the issues sufficiently distinct to avoid a finding of waiver because, among other things, the claims in the eviction proceedings, unlike those in the franchise agreement disputes, were nonarbitrable. *Id.*; *see also Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 114 (2d Cir. 1987) (holding that complaint did not "alter the scope or theory" of the claims to which one party had already explicitly waived arbitration, and therefore the waiver applied to the claims raised in the complaint).

We agree that different claims may arise from a common factual basis, and that in one claim, a party may wish to waive arbitration while preserving that right in the other. However, as we said in *Gingiss*, when the same issues are presented, a party may not escape the effect of its waiver by minimally restyling the claim and presenting it for arbitration. The Grumhaus children contend that because they brought "different causes of action" in their request to arbitrate, they have successfully brought different issues. In this view, any distinction between the legal elements required to plead one cause and those required for a second would allow the plaintiff to escape the effect of a waiver. The federal courts long ago ceased using the arcane and overly technical system of code pleading and causes of action in favor of a more

substance oriented system that focuses on the merits of issues raised in court filings. *See, e.g., Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) (explaining purposes behind shift from fact to notice pleading). Our choice of the word "issue" in *Gingiss* reflects this continuing determination to focus on the substantive merits of various claims, rather than on the purely technical aspects.

The Grumhaus children contend that the causes of action brought in the state court – conversion, unjust enrichment, constructive trust and constructive fraud – are different from those in the arbitration claim – negligence, breach of duty, violations of state and federal securities laws. However, it is all one dispute, stemming entirely from Comerica's action in liquidating the Dean Foods stock belonging to the Grumhauses, and the issue-whether Comerica wrongfully liquidated the stocks-is the same. The choices of remedies are the same in both actions, and a favorable resolution of one would have precluded as a double recovery relief in the other. Thus, the case is distinguishable from *Gingiss* and *Doctor's Associates*, in which the rights and remedies underlying the different claims were distinct. When the Grumhaus children chose to file suit against Comerica over the wrongful liquidation of their assets, they waived their right to have an arbitrator resolve that dispute.

We have held that even when the presumption applies, other factors may absolve the defaulting party of its effect. *See Cabinetree*, 50 F.3d at 390-91. We outlined some of those special circumstances in *Cabinetree*, 50 F.3d at 391, but none applies here. The plaintiffs had no special concern about a statute of limitations or doubts about whether their claims were arbitrable, nor did the litigation take such unexpected

turns to make it obvious that the Grumhaus children should be relieved from their waiver. Prejudice and delay also may be factors in relieving one party from its waiver, *see id.*, but these factors are not compelling here. Comerica was not unduly prejudiced by the Grumhaus children's delay in seeking arbitration, but the Grumhaus children did not do all they reasonably should have been expected to do to make the "earliest feasible determination" of which forum to elect. *Id.* It took more than a year after they initiated a court suit to formally demand arbitration. Until then, Comerica could not be sure, despite some suggestions in May 1998, that the plaintiffs would seek arbitration. This lack of diligence by the Grumhaus children counsels against absolving them of their waiver.

III. CONCLUSION

The Grumhaus children chose to litigate their dispute against Comerica and thereby waived their contractual right to arbitrate. Under the law of this Circuit, they must now live with that choice. The district court erred in finding that the plaintiffs had not waived arbitration, and we hereby VACATE the order compelling arbitration.

A true Copy:

Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Filed November 23, 1999]

No. 99 C 1776

ANDREW S. GRUMHAUS and LESLIE GRUMHAUS DAVIDSON, *Plaintiffs*,	)
v.	)
COMERICA SECURITIES, INC., as successor-in-interest to Comerica Financial Services, Inc., *Defendant.*	)

MEMORANDUM AND ORDER

This lawsuit is based on the allegation that defendants wrongfully sold stock owned by plaintiffs in order to satisfy the debts of plaintiffs' father. Plaintiffs seek to submit the dispute to arbitration. Defendants argue that there is no valid agreement to arbitrate and, alternatively, that plaintiffs have waived their right to arbitration. For the reasons set forth

below, we grant plaintiffs' motions and direct the parties to arbitrate their dispute.

BACKGROUND

In July and September 1994, two securities accounts were opened at Comerica Securities, Inc. (Comerica), one in the name of Andrew S. Grumhaus and the other in the name of Leslie Grumhaus Davidson (collectively "plaintiffs"). Plaintiffs allege that they were not aware of the existence of these accounts until recently. Although the plaintiffs' signatures appear on the agreements opening these accounts, Andrew Grumhaus alleges that his signature was a forgery and Leslie Grumhaus Davidson alleges that someone else completed the agreement after she had affixed her signature to it. Based on these allegedly unauthorized agreements, thousands of shares of stock owned by plaintiffs were transferred into the Comerica accounts. By November 1994, Comerica had sold over a million dollars worth of plaintiffs' stock without their knowledge. In conjunction with an affiliated bank, Comerica applied the proceeds of the sale of stock to pay down debts owed by plaintiffs' deceased father.

Plaintiffs learned of this allegedly unauthorized sale of stock in 1996. In October 1997, plaintiffs filed a lawsuit in Illinois state court against eight entities, including Comerica, claiming wrongful sale of their stock. Several of the entities (but not Comerica) filed a motion to dismiss the complaint and, on March 17, 1998, Judge Neville of the Circuit Court of Cook County granted the motion without prejudice. In the dismissal order Judge Neville stated that "[n]othing contained herein shall waive any party's right (i) to argue that an alleged contractual arbitration clause compels litigation of this case in

another tribunal, or (ii) to argue that any such arbitration clause is either inapplicable or unenforceable." In May 1998, plaintiffs filed an amended complaint in state court against only one of the entities it had named in the original complaint. Also in May 1998, plaintiffs filed, and Judge Neville signed, a non-suit order voluntarily dismissing plaintiffs' claims against Comerica and several other defendants. The non-suit order stated that plaintiffs "presently intend to commence arbitration proceedings against Comerica . . . and are taking this dismissal relative to [Comerica] to permit the arbitration to go forward."

On November 23, 1998, plaintiffs commenced arbitration against Comerica by filing a statement of claim with the National Association of Securities Dealers (NASD). The NASD provides an arbitration mechanism for disputes involving its member firms. The arbitration claim alleged that Comerica, an NASD member, wrongfully liquidated plaintiffs' stock and disposed of the proceeds without their authorization, in violation of federal and state securities laws and state common law. On December 16, 1998, an NASD official notified Comerica of the arbitration claim. Comerica responded on February 11, 1999, stating that it was not required to arbitrate the claims and that it was seeking to intervene in the pending state court lawsuit. On March 15, 1999, Judge Neville rejected Comerica's request to intervene. Comerica has appealed that decision to the Illinois Appellate Court.

On March 18, 1999, plaintiffs filed a complaint pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16,

to compel NASD arbitration of their dispute with Comerica.[1] Specifically, plaintiffs seek 1) an order compelling arbitration of the dispute and enjoining Comerica from interfering with the arbitration proceedings, 2) an order striking the affirmative defenses raised in Comerica's answer to the complaint, and 3) a protective order precluding further discovery.[2] Comerica denies that there was any agreement to arbitrate the dispute, and alternatively argues that plaintiffs waived their right to seek arbitration when they filed their state court lawsuit.

DISCUSSION

I. Arbitration Agreement

It is well settled that a party cannot be required to arbitrate a dispute unless it has agreed to do so. AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648-49 (1986). When an agreement to arbitrate exists, however, the Federal Arbitration Act (FAA) requires district courts to compel arbitration. *See* 9 U.S.C. § 2. Indeed, federal policy favors the enforcement of private arbitration agreements. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 225-26 (1987). This policy is embodied in the FAA, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save

---

[1] Plaintiffs amended their complaint, with our permission, on May 11, 1999.

[2] Non-party LaSalle Bank Illinois has joined in plaintiffs' motion regarding discovery and has filed a motion to quash a subpoena issued upon it by Comerica.

upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. The FAA also authorizes a federal district court to issue an order compelling arbitration if there has been a "failure, neglect, or refusal" to comply with an arbitration agreement. 9 U.S.C. § 4. Where the parties have agreed to arbitrate, the merits of the case are left for the arbitrator to resolve. Determining whether there is an agreement to arbitrate in the first place, however, is the responsibility of the district court.

Plaintiffs' argument that Comerica has agreed to arbitrate is based on an arbitration clause contained in the agreements opening plaintiffs' accounts with Comerica, and Comerica's status as an NASD member. Comerica denies that arbitration is required on either of these grounds.[3] We agree with plaintiffs that arbitration is required by virtue of Comerica's membership in NASD and therefore do not address the issue whether the arbitration clause contained in the allegedly unauthorized account agreements also constitutes an arbitration contract between the parties.[4]

---

[3] Many arguments Comerica raises in its brief opposing arbitration are also asserted as affirmative defenses in its answer to plaintiffs' complaint. For example, Comerica's argument that there is no arbitration agreement is also raised in affirmative defenses 1 and 2 of its answer. Insofar as we find Comerica's arguments unpersuasive on the merits of the arbitrability issue, we grant plaintiffs' motion to strike Comerica's affirmative defenses.

[4] Because the account agreements do not factor into our holding that an obligation to arbitrate exists, we deny Comerica's request for a trial on the issue whether the signatures on the account agreements are authentic. That issue is for the arbitrator to resolve.

Comerica has not disputed that it is, and at all relevant times has been, a member of NASD. As an NASD member, Comerica has agreed to abide by the organization's rules and regulations, including rules requiring member firms to submit disputes to arbitration under certain circumstances. For example, Rule 10301 of the NASD Code of Arbitration Procedure provides:

> Any dispute, claim or controversy . . . between a customer and a member . . . arising in connection with the business of such member . . . shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer.

Plaintiffs argue that Rule 10301 and related provisions of the NASD Code of Arbitration Procedure require Comerica to submit its dispute to arbitration.

Provisions such as NASD Rule 10301 are sufficient to create an enforceable arbitration agreement. See Wilson v. Sterling Foster & Co., Inc., 1998 WL 749065, at *3-4 (N.D.Ill. Oct. 15, 1998); Lehman Bros. Inc. v. Certified Reporting Co., 939 F.Supp. 1333, 1336-37 (N.D. Ill. 1996). No separate arbitration contract between the parties is required. In Patten Securities Corp., Inc. v. Diamond

---

Accordingly, we grant plaintiffs' motion for a protective order regarding Comerica's discovery requests and also grant non-party LaSalle Bank Illinois' motion to quash the subpoena issued upon it by Comerica.

Greyhound & Genetics, Inc., 819 F.2d 400, 406 (3d Cir. 1987), the court held that an NASD member firm "is compelled by its NASD membership to submit [to arbitration] even absent a specific contractual arbitration undertaking directly with [the customer]." The Seventh Circuit is in accord with Patten on this issue. *See* Geldermann, Inc. v. C.F.T.C., 836 F.2d 310, 318-19 (7th Cir. 1987) (relying on Patten to hold that a firm's status as a member of the Chicago Board of Trade required it to submit disputes to arbitration), *cert. denied*, 488 U.S. 816 (1988).

Pursuant to Rule 10301, plaintiffs may demand NASD arbitration if they were customers of Comerica at the time of the alleged misconduct. Courts have not applied a restrictive construction to the term "customer." When the sale of securities is concerned, an informal business relationship will suffice to confer customer status on an investor. *See* Lehman, 939 F. Supp at 1340-41; see also Miller v. Flume, 139 F.3d 1130, 1135-36 (7th Cir.), *cert. denied*, 119 S.Ct. 74 (1998). In this case, Comerica opened securities accounts for plaintiffs, sold more than a million dollars worth of plaintiffs' stock and applied the proceeds toward the debts of plaintiffs' father. Clearly, Comerica treated plaintiffs as its customers. Even if these activities were conducted without the plaintiffs' knowledge or authority, they are sufficient to establish that plaintiffs were customers of Comerica within the meaning of Rule 10301. Therefore, plaintiffs have the right to demand NASD arbitration of their disputes with Comerica.

II. Waiver

Comerica argues in the alternative that, even if there was an arbitration agreement, plaintiffs have waived their

right to demand arbitration by initially filing a lawsuit against Comerica in Illinois state court. It is the established law in this circuit that a party to an arbitration agreement may waive its right to seek arbitration. In Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995), the Seventh Circuit held that an election to proceed before a non-arbitral tribunal for resolution of a dispute constitutes a "presumptive waiver of the right to arbitrate." In the same breath, however, the court emphasized the presumptive nature of the waiver rule: "[A] variety of circumstances may make the case abnormal, and then the district court should find no waiver or should permit a previous waiver to be rescinded." *Id.* at 390-91. Recently, in Iowa Grain Co. v. Brown, 171 F.3d 504, 509 (7th Cir. 1999), the Seventh Circuit reinforced "the recognition in Cabinetree that [waiver] is just a presumption, not an invariable rule." The Seventh Circuit held that the district court in that case "correctly looked at the totality of the circumstances before it decided that no waiver had occurred" as a result of defendants' decision to initiate nonarbitral proceedings. *Id.* at 510.

A number of factors present in this case similarly persuade us that plaintiffs have not waived their right to arbitrate their dispute with Comerica. First, although plaintiffs initiated a state court lawsuit against Comerica before seeking arbitration, the issues raised in the state court complaint are different from than those raised in the NASD arbitration claim. In state court plaintiffs raised common law claims of conversion, constructive trust, unjust enrichment, and constructive fraud. In their NASD arbitration claim, on the other hand, plaintiffs sought relief for violations of federal and state securities laws, as well as for breach of fiduciary

duty and negligence. Bearing in mind that "an important part of the district court's waiver inquiry is to determine as a matter of fact whether the party filing the lawsuit intended to elect a judicial forum rather than the arbitral tribunal," Iowa Grain, 171 F.3d at 509, it cannot be said that plaintiffs evinced an intent to waive their right to arbitrate when the causes of action raised in their judicial proceeding differ from those raised in their arbitration claim. *See* Gingiss Intern., Inc. v. Bormet, 58 F.3d 328, 331 (7th Cir. 1995); Design Ben. Plans, Inc. v. Enright, 940 F.Supp. 200, 203 (N.D. Ill. 1996).

Second, the diligence of plaintiffs in seeking arbitration early in the process and before Comerica had become significantly involved in the state court litigation weighs heavily in favor of our finding that plaintiffs have not waived their right to arbitrate. *See* Cabinetree, 50 F.3d at 391; *see also* Iowa Grain, 171 F.3d at 510 ("even if a district court finds an initial waiver of the right to arbitrate, it is also entitled to permit that waiver to be rescinded, depending on the course the litigation takes."). Plaintiffs' state court litigation against Comerica was brief and minimal. In short order, plaintiffs filed a complaint, responded to Comerica's bill of particulars, and then obtained a non-suit order voluntarily dismissing their claims against Comerica. Unlike the defendant in St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., Inc., 969 F.2d 585, 589 (7th Cir. 1992), who was found to have waived its right to arbitrate, plaintiffs in this case did not file a motion to

dismiss, but merely responded to one.[5] Furthermore, no discovery was conducted with respect to Comerica. *See* Iowa Grain, 171 F.3d at 510. The skeletal nature of the state court litigation militates against a finding of waiver here.

Third, orders issued in the state court case expressly acknowledge the viability of arbitration. Judge Neville's March 1998 dismissal order provided that "[n]othing contained herein shall waive any party's right (i) to argue that an alleged contractual arbitration clause compels litigation of this case in another tribunal, or (ii) to argue that any such arbitration clause is either inapplicable or unenforceable." The May 1998 non-suit order states that plaintiffs "are taking this dismissal relative to [Comerica] to permit the arbitration to go forward." The language of these orders clearly indicates that the state court did not mean for its rulings to constitute waiver of plaintiffs' right to pursue arbitration. *See* Iowa Grain, 171 F.3d at 511.

Finally, while prejudice is not a dispositive factor in the calculus, the absence of any prejudice to Comerica from arbitrating its dispute with plaintiffs strongly supports sending this case to arbitration. *See* Cabinetree, 50 F.3d at 391. Comerica should have known since March 1998 that arbitration was a possible course of action, and has known since May 1998 that plaintiffs intended to pursue arbitration of its dispute. Comerica did not contest plaintiffs' right to arbitrate until February 1999, when it responded to the NASD's notice of plaintiffs' arbitration claim against it.

---

[5] Notably, Comerica did not join in the motion to dismiss filed in the state court proceeding.

Comerica cannot, and does not, attempt to argue that it was surprised when plaintiffs filed for arbitration or that its claims and defenses will be adversely affected if required to arbitrate this dispute. Comerica will suffer no prejudice from an order compelling arbitration.

Taking all these circumstances into account, we conclude that plaintiffs have not lost their right to arbitrate. Pursuant to its obligations as a member of NASD, Comerica must submit its dispute with plaintiffs to arbitration.

III. State Court Appeal

In addition to an order compelling NASD arbitration, plaintiffs seek an injunction precluding Comerica from interfering with their right to arbitrate. Comerica argues that plaintiffs do not have the right to enjoin Comerica from prosecuting its appeal of Judge Neville's order denying its motion to intervene in the state court litigation. That appeal is presently pending before the Illinois Appellate Court. Comerica's argument is unsupported by the law of this circuit. When necessary to effectuate an order compelling arbitration, a district court has the authority to enjoin a party from pursuing state court litigation. *See* We Care Hair Development, Inc. v. Engen, 180 F.3d 838, 844 (7th Cir. 1999). Accordingly, we enjoin further prosecution of the state court appeal and direct Comerica to proceed with NASD arbitration without interfering with plaintiffs' right to arbitrate.

CONCLUSION

For the reasons stated above, we grant plaintiffs' motions to compel arbitration and preclude Comerica from interfering with arbitration, to strike Comerica's affirmative defenses, and for a protective order precluding further discovery. We also grant LaSalle Bank Illinois' motion to quash the subpoena issued upon it by Comerica. The parties are directed to submit their dispute to NASD arbitration.

/s/_____
JAMES B. MORAN
Senior Judge, U.S. District Court

November 19, 1999

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed November 19, 1999]

No. 99 C 1776

ANDREW S. GRUMHAUS, et al.)
Plaintiffs,)
)
v.)
)
COMERICA SECURITIES, INC.,)
Defendant.)

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that we grant plaintiffs' motions to compel arbitration and preclude Comerica from interfering with arbitration, to strike

Comerica's affirmative defenses, and for a protective order precluding further discovery. We also grant LaSalle Bank Illinois' motion to quash the subpoena issued upon it by Comerica. The parties are directed to submit their dispute to NASD arbitration. Cause dismissed.

Michael W. Dobbins, Clerk of Court

/s/_____
Willie A. Haynes, Deputy Clerk

Date: 11/19/99

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

[Filed September 7, 2000]

No. 99-4238

ANDREW S. GRUMHAUS and LESLIE GRUMHAUS-DAVIDSON, *Plaintiffs-Appellees*,	)
v.	)
COMERICA SECURITIES, INC., as successor-in-interest to Comerica Financial Services, Inc., *Defendant-Appellant*.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 99 C 1776 -- James B. Moran, *Judge*

Before Hon. RICHARD A. POSNER, Hon. JOHN L. COFFEY, Hon. MICHAEL S. KANNE, *Circuit Judges*.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are DENIED.

Supreme Court, U.S.
FILED
MAR 8 2001
CLERK

(2)

No. 00-938

In the Supreme Court of the United States

ANDREW S. GRUMHAUS AND
LESLIE GRUMHAUS DAVIDSON,
Petitioners,

v.

COMERICA SECURITIES, INC.,
AS SUCCESSOR-IN-INTEREST TO COMERICA
FINANCIAL SERVICES, INC.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

JAMES C. SCHROEDER
Counsel of Record
WILLIAM E. DEITRICK
JEFFREY W. SARLES
DAVID W. FULLER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether petitioners waived their right to arbitrate by filing a lawsuit in state court and, after the state court dismissed their complaint without prejudice five months later, waiting another eight months before filing for arbitration.

2. Whether the court of appeals had jurisdiction where the district court entered final judgment after compelling arbitration and dismissing all additional claims, an issue decided earlier this Term in *Green Tree Fin. Corp.* v. *Randolph*, 121 S. Ct. 513 (2000).

RULE 14.1 AND RULE 29.6 STATEMENT

The petition correctly lists the parties in the court of appeals.

Respondent Comerica Securities, Inc. is 100% owned by Comerica Investment Services, Inc., which is 99% owned by Comerica Bank and 1% owned by Comerica, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1 AND RULE 29.6 STATEMENT ii

STATEMENT OF THE CASE 1

Petitioners' Allegations 1

Petitioners' State Court Suit 1

Petitioners' Arbitration Demand 2

The District Court Proceeding 2

The Court Of Appeals Ruling 3

REASONS FOR DENYING THE PETITION 4

I. THERE IS NO GENUINE CONFLICT OVER HOW TO RESOLVE CLAIMS THAT PARTIES INITIATING JUDICIAL ACTIONS HAVE WAIVED ARBITRATION 5

A. All The Courts Of Appeals View Waiver As A Fact-Intensive Inquiry Involving Multiple Factors, Including Prejudice 5

B. Petitioners Impermissibly Lump Together Waiver Claims Against Both Plaintiffs And Defendants To Generate A False Conflict 10

TABLE OF CONTENTS (Continued)

Page

II. THE PETITION RAISES NO IMPORTANT QUESTION REQUIRING RESOLUTION BY THIS COURT 12

III. THIS COURT'S DECISION IN *GREEN TREE FINANCIAL* HAS RESOLVED THE SECOND ISSUE PRESENTED 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page**

Ballard Shipping Co., In re, 752 F. Supp. 546 (D.R.I. 1990) 11

Barker v. *Golf U.S.A., Inc.*, 154 F.3d 788 (8th Cir. 1998), cert. denied, 525 U.S. 1068 (1999) 8

Cabinetree, Inc. v. *Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995) 7, 14

Crysen/Montenay Energy Co., In re, 226 F.3d 160 (2d Cir. 2000), petition for cert. filed (Jan. 11, 2001) (No. 00-1119) 5, 6

Doctor's Assocs. v. *Distajo*, 107 F.3d 126 (2d Cir.), cert. denied, 522 U.S. 948 (1997) 8

Duferco Steel Inc. v. *M/V Kalisti*, 121 F.3d 321 (7th Cir. 1997) 6

First Options, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 13

Frye v. *Paine, Webber, Jackson & Curtis*, 877 F.2d 396 (5th Cir. 1989), cert. denied, 494 U.S. 1016 (1990) 8

Gilmore v. *Shearson/Am. Express Inc.*, 811 F.2d 108 (2d Cir. 1987) 14

Green Tree Fin. Corp. v. *Randolph*, 121 S. Ct. 513 (2000) 14

TABLE OF AUTHORITIES (Continued)

Page

Hoffman Constr. Co. v. *Active Erectors & Installers, Inc.*, 969 F.2d 796 (9th Cir. 1992), cert. denied, 507 U.S. 911 (1993) 8

Iowa Grain Co. v. *Brown*, 171 F.3d 504 (7th Cir. 1999) 6

Jones Motor Co. v. *Chauffeurs, Teamsters & Helpers Local No. 633*, 671 F.2d 38 (1st Cir. 1982) 5

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 9

Kulukundis Shipping Co. v. *Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) 11

McWilliams v. *Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998) 6

Menorah Ins. Co. v. *INX Reins. Corp.*, 72 F.3d 218 (1st Cir. 1995) 8

Morrie Mages & Shirlee Mages Found. v. *Thrifty Corp.*, 916 F.2d 402 (7th Cir. 1990) 6

National Found. for Cancer Research v. *A.G. Edwards & Sons*, 821 F.2d 772 (D.C. Cir. 1987) 6

Navieros Inter-Americanos, S.A. v. *M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997) 8

Price v. *Drexel Burnham Lambert, Inc.*, 791 F.2d 1156 (5th Cir. 1986) 5, 6

TABLE OF AUTHORITIES (Continued)

Page

Ritzel Communications, Inc. v. *Mid-Am. Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 1993) 6, 12

S & H Contractors, Inc. v. *A.J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991) 6, 8

S & R Co., In re, 159 F.3d 80 (2d Cir. 1998), cert. dismissed, 528 U.S. 1058 (1999) 5

Scherk v. *Alberto Culver Co.*, 417 U.S. 506 (1974) 14

St. Mary's Med. Ctr. v. *Disco Aluminum Prods. Co.*, 969 F.2d 585 (7th Cir. 1992) 6, 7, 12

Stifel, Nicolaus & Co. v. *Freeman*, 924 F.2d 157 (8th Cir. 1991) 11, 12

United States v. *Kubrick*, 444 U.S. 111 (1979) 9

Volt Info. Sciences, Inc. v. *Board of Trustees*, 489 U.S. 468 (1989) 4, 12, 13, 14

Wilson v. *Garcia*, 471 U.S. 261 (1985) 9

Wood v. *Prudential Ins. Co.*, 207 F.3d 674 (3d Cir.), cert. denied, 121 S. Ct. 305 (2000) 8

TABLE OF AUTHORITIES (Continued)

Statutes **Page**

9 U.S.C. § 1 4

9 U.S.C. § 3 7

9 U.S.C. § 4 7

Miscellaneous

2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 21.3.2.1A (Supp. 1999) 10, 11

The question in this case is whether the petitioners waived their contractual right to arbitrate against respondent Comerica Securities, Inc. ("Comerica") by suing Comerica in state court and, then, after the court dismissed all their claims, seeking arbitration more than 13 months after filing suit. The Seventh Circuit answered the question in the affirmative, applying the same multi-factor, "totality of the circumstances" test to evaluate the claimed waiver that all the other courts of appeals employ. This inquiry is necessarily fact-specific, and any minor variations in the weight the courts of appeals give to particular factors, including prejudice to the nonwaiving party, have little or no impact on the outcome of their waiver determinations. This is especially true in cases such as this one, where the party who initiated litigation is found to have waived arbitration. In short, there is no circuit conflict warranting this Court's review.

STATEMENT OF THE CASE

Petitioners' Allegations. In an attempt to repay overdue personal and business loans to LaSalle Bank ("LaSalle"), petitioners' father apparently forged their signatures on documents pledging as collateral large blocks of Dean Foods stock owned by petitioners, and directed LaSalle to sell the stock. LaSalle asked respondent Comerica, a securities broker, to help effectuate the sale. The stock was sold in 1994 and the proceeds applied to repay the LaSalle loans. Petitioners allegedly did not discover that more than $1 million of stock belonging to them had been sold until two years later. Pet. App. 2a-3a.

Petitioners' State Court Suit. On October 7, 1997, petitioners filed suit against Comerica, LaSalle, and Southwest Securities (another brokerage firm) in Illinois state court. Petitioners alleged that the defendants collectively sold the Dean Foods stock without their permission, and they sought damages equal to the present value of the stock as well as a constructive trust for the proceeds of the sale. Pet. App. 3a. Comerica initially joined in a motion by LaSalle to dismiss petitioners' complaint, but subsequently withdrew its joinder

and instead demanded a bill of particulars. R.22, ¶¶ 43, 52; R.11, Ex. C; R.25, Ex. B. Nevertheless, petitioners' response to the motion to dismiss specifically addressed Comerica's dismissal arguments. R.24, Ex. 3.

On March 17, 1998, the state court dismissed petitioners' complaint in its entirety against all defendants, including Comerica, granting petitioners leave to replead. Pet. App. 3a. The court's dismissal order provided: "Nothing contained herein shall waive any party's right (i) to argue that an alleged contractual arbitration clause compels litigation of this case in another tribunal, or (ii) to argue that any such arbitration clause is either inapplicable or unenforceable." R.22, Ex. J, p. 2. On May 26, 1998, more than two months after the state court dismissed their original complaint, petitioners filed an amended complaint against LaSalle and voluntarily dismissed their claims against Comerica and Southwest Securities without prejudice, stating that they intended to arbitrate their dispute with the two brokerage firms. R.22, ¶ 46 & Ex. K; R.23, Ex. A.

Petitioners' Arbitration Demand. Petitioners waited another six months, until November 23, 1998, before filing a demand for arbitration against Comerica with the National Association of Securities Dealers ("NASD"). R.22, ¶ 17. They never sought arbitration against Southwest Securities, apparently dropping their claims against that brokerage firm. Petitioners' arbitration demand against Comerica alleged, like their complaint in state court, that Comerica had wrongfully sold their stock and relied on forged documents to pay off their father's LaSalle loans. R.22, Ex. C. Petitioners requested the value of the stock as damages. *Ibid.* Comerica responded by denying that petitioners were entitled to arbitrate the parties' dispute. R.22, Ex. E.

The District Court Proceeding. After Comerica refused to proceed with arbitration, petitioners initiated the present litigation by filing a complaint in the district court on March

18, 1999. R.22, ¶¶ 48, 62. They sought to compel arbitration and later amended their complaint to add claims based on the same allegations that they previously had raised in the state court and with the NASD. The district court rejected Comerica's contention that petitioners had waived their right to arbitrate by litigating their claims in state court, and it ordered Comerica to proceed to arbitration. Pet. App. 22a.

The Court Of Appeals Ruling. In a unanimous opinion authored by Judge Kanne and joined by Chief Judge Posner and Judge Coffey, the Seventh Circuit reversed. Looking at the "totality of the circumstances," the court of appeals held that petitioners implicitly waived their right to arbitrate by selecting a judicial forum for resolution of their dispute. Pet. App. 5a-6a. The court explained that although petitioners "were aware of their right to arbitrate," they filed suit against Comerica in state court, litigated their claims for several months, decided to switch to an arbitral forum because they were "disappointed" that the state court dismissed their complaint, and then "waited several more months" – until more than a year after filing the initial state court action – to finally file a demand for arbitration. *Id.* at 7a. The court concluded that "this knowing selection of one forum over another and willing participation in the ensuing litigation was plainly inconsistent with a desire to arbitrate." *Ibid.*

The court rejected petitioners' arguments that they "never submitted their state court action for judgment" and that their state court suit and arbitration demand involved different causes of action. Pet. App. 7a-8a. The court reasoned that by initiating the state court action and filing a complaint, petitioners expressed their intent to submit their claims for decision in a judicial forum. *Id.* at 7a. In addition, in both state court and the arbitration, petitioners charged Comerica with wrongful liquidation of their stock and therefore could not "escape" the effect of their waiver by "restyling" their substantively identical claims. *Id.* at 9a-10a.

Finally, the court determined that "other factors," including an alleged lack of "[p]rejudice and delay," were "not compelling" and thus could not overcome the presumption that petitioners' judicial prosecution of their claims waived their right to an arbitral forum. Although "Comerica was not unduly prejudiced" by the delay, petitioners "took more than a year" to seek arbitration after filing their state court suit, and their "lack of diligence" supported a finding that they had waived their right to arbitrate. Pet. App. 10a-11a.

REASONS FOR DENYING THE PETITION

As demonstrated below, all the courts of appeals evaluate waiver of the right to arbitrate much the same as waiver of any other contractual right, thereby implementing this Court's mandate to place arbitration agreements "upon the same footing as other contracts." *Volt Info. Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 474 (1989). The circuits uniformly apply a multi-factor, totality of the circumstances standard to waiver issues, and minor variations in the weight given to particular factors, including prejudice to the nonwaiving party, do not establish the type of conflict appropriate for this Court's review. Especially where, as here, the party charged with waiver initiated the court action and waited over a year to demand arbitration, waiver of its right to arbitrate would be manifest no matter how a court balanced particular factors.

Furthermore, the petition raises no issue of genuine importance. The decision below was fully consistent with federal arbitration policy, which recognizes that the right to arbitrate rests on the consent of the parties and thus may be abrogated by one party's resort to litigation. Petitioners' focus on the prejudice factor is inconsistent with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, which expressly recognizes, without mentioning prejudice or any other factor, that parties may waive the right to use its enforcement mechanisms.

I. THERE IS NO GENUINE CONFLICT OVER HOW TO RESOLVE CLAIMS THAT PARTIES INITIATING JUDICIAL ACTIONS HAVE WAIVED ARBITRATION.

A. All The Courts Of Appeals View Waiver As A Fact-Intensive Inquiry Involving Multiple Factors, Including Prejudice.

Determining whether a party has waived its right to arbitrate by resorting to litigation necessarily requires a highly fact-specific inquiry. For that reason, the courts of appeals uniformly evaluate a claim of waiver by looking to the totality of the circumstances and applying multiple factors. The Second Circuit's approach is typical:

> [I]n determining whether a party has waived its right to arbitration, we will consider such factors as (1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice. There is no bright-line rule, however, for determining when a party has waived its right to arbitration: the determination of waiver depends on the particular facts of each case.

In re Crysen/Montenay Energy Co., 226 F.3d 160, 163 (2d Cir. 2000) (citation omitted), petition for cert. filed (Jan. 11, 2001) (No. 00-1119).[1/]

[1/] See also, *e.g.*, *Jones Motor Co.* v. *Chauffeurs, Teamsters & Helpers Local No. 633*, 671 F.2d 38, 44 (1st Cir. 1982) (applying numerous "relevant factors" in waiver analysis); *In re S & R Co.*, 159 F.3d 80, 83 (2d Cir. 1998) (waiver inquiry "is fact-specific and there are no bright-line rules"), cert. dismissed, 528 U.S. 1058 (1999); *Price* v. *Drexel Burnham*

In accord with this established approach, the Seventh Circuit looked to "all the circumstances" to decide whether there was a waiver in this case (see Pet. App. 6a), as it does consistently. See *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 510 (7th Cir. 1999) (court must look at "the totality of the circumstances" to decide whether waiver occurred); *Duferco Steel Inc.* v. *M/V Kalisti*, 121 F.3d 321, 326 (7th Cir. 1997) (waiver determination is "based on the circumstances") (quoting *St. Mary's Med. Ctr.* v. *Disco Aluminum Prods. Co.*, 969 F.2d 585, 588 (7th Cir. 1992)); *Morrie Mages & Shirlee Mages Found.* v. *Thrifty Corp.*, 916 F.2d 402, 405 (7th Cir. 1990) (waiver depends on "the circumstances of the particular case"). Thus, the circuit courts of appeals are in fundamental agreement about how to analyze a claim of waiver.

Prejudice to the party claiming waiver is one of the factors that the circuit courts use to evaluate a waiver claim. *E.g.*, *Crysen/Montenay*, 226 F.3d at 163 (noting that the prejudice factor "largely collapses" into the amount of litigation factor); *National Found. for Cancer Research* v. *A.G. Edwards & Sons*, 821 F.2d 772, 777 (D.C. Cir. 1987) ("a court may consider prejudice to the objecting party as a relevant factor"); *Price* v. *Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1161 (5th Cir.

Lambert, Inc., 791 F.2d 1156, 1161 (5th Cir. 1986) (waiver depends on "other considerations" in addition to judicial activity and prejudice); *Ritzel Communications, Inc.* v. *Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 971 (8th Cir. 1993) (waiver depends on "the particular facts" and "all the circumstances"); *McWilliams* v. *Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) (identifying six factors relevant to waiver determination); *S & H Contractors, Inc.* v. *A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (addressing waiver "under the totality of the circumstances"); *National Found. for Cancer Research* v. *A.G. Edwards & Sons*, 821 F.2d 772, 777 (D.C. Cir. 1987) (considering various "circumstances" in addressing waiver).

1986) (considering prejudice "along with other considerations"). Like its sister circuits, the Seventh Circuit considers prejudice to be one of many factors in the waiver inquiry. See *St. Mary's*, 969 F.2d at 590 ("prejudice is but one relevant circumstance"). Indeed, depending on "a variety of circumstances," the Seventh Circuit maintains that in some cases "prejudice to the other party, the party resisting arbitration, should weigh heavily." *Cabinetree, Inc.* v. *Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995). In the decision below, the Seventh Circuit again recognized that "[p]rejudice and delay also may be factors" in the waiver inquiry, but concluded that "these factors are not compelling here" in light of the specific facts of this case. Pet. App. 11a.

To be sure, some courts of appeals, including the Seventh Circuit, sometimes accord the prejudice factor less weight than others do when balancing the totality of the circumstances for waiver purposes in a specific case. But any such variation among the circuits in how much weight they give particular factors in individual cases hardly suggests a genuine or important conflict of the type warranting this Court's resolution.

In fact, the FAA itself indicates otherwise. Congress inscribed its recognition that a party may waive its right to arbitrate into the text of the FAA – *without any mention of prejudice or any other factor*. Section 3 authorizes a court to stay litigation pending arbitration only if the applicant "is not in default." Section 4 authorizes a court to compel arbitration only if the "the failure [of the applicant] to comply [with the agreement] is not in issue." See 9 U.S.C. §§ 3-4. Neither provision mentions prejudice or any other factor, leaving the courts with discretion and leeway in their application of particular factors to particular circumstances.

The courts have been applying that discretion on a case-by-case basis for many years, and any differences in the weight

they accord particular factors, including prejudice, have proven tolerable. This Court has repeatedly denied petitions for certiorari from such waiver decisions.[2/] Petitioners offer no plausible reason to reverse course now.

The cases show that the courts' varying weightings of the prejudice factor rarely if ever affect the outcome of a case. Even if prejudice were deemed a required element, as petitioners propose, the impact would be nonexistent or negligible. For example, in *Navieros Inter-Americanos, S.A.* v. *M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997), the First Circuit insisted that the party urging waiver "must show prejudice," yet it found that a party's participation in litigation that resulted in a delay of "only one month" waived its right to arbitrate. *Id.* at 316. The Seventh Circuit in this case, without requiring a showing of prejudice, similarly found waiver where petitioners litigated for almost eight months and waited still another five months to demand arbitration. In each case, the court looked to the conduct of the party charged with waiver in the specific factual context at hand. How the courts articulated the significance of the prejudice factor was not determinative. See also *Menorah Ins. Co.* v. *INX Reins. Corp.*, 72 F.3d 218,

---

[2/] *E.g.*, *Wood* v. *Prudential Ins. Co.*, 207 F.3d 674 (3d Cir.), cert. denied, 121 S. Ct. 305 (2000); *Barker* v. *Golf U.S.A., Inc.*, 154 F.3d 788 (8th Cir. 1998), cert. denied, 525 U.S. 1068 (1999); *Doctor's Assocs.* v. *Distajo*, 107 F.3d 126 (2d Cir.), cert. denied, 522 U.S. 948 (1997); *Hoffman Constr. Co.* v. *Active Erectors & Installers, Inc.*, 969 F.2d 796 (9th Cir. 1992), cert. denied, 507 U.S. 911 (1993); *S & H Contractors, Inc.* v. *A.J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991); *Frye* v. *Paine, Webber, Jackson & Curtis*, 877 F.2d 396 (5th Cir. 1989), cert. denied, 494 U.S. 1016 (1990).

221 (1st Cir. 1995) (stating that party would have waived arbitration whether or not court used prejudice "litmus test").

The decision below further reveals the absence of any real conflict on this issue, because the court of appeals did not completely ignore the prejudice factor, as petitioners contend. The court concluded that Comerica was "not *unduly* prejudiced" (Pet. App. 11a, emphasis added), indicating that in its view Comerica did suffer some prejudice from petitioners' resort to the courts and 13-month delay in seeking arbitration. The extent of that prejudice may have been limited, but other factors bearing on waiver, especially petitioners' plain rejection of their right to arbitrate by bringing suit and their belated invocation of that right only after dismissal of their complaint, more than compensated. Given these circumstances, the Seventh Circuit's adoption of petitioners' proposed waiver standard would not affect the outcome of this case, demonstrating the illusory nature of the apparent conflict they assert.[3/]

[3/] Comerica was inherently prejudiced by petitioners' long delay in seeking arbitration. "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985); see also *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (parties who have been "sleeping on their rights" may not bring suit "only long after the memories of witnesses have faded or evidence is lost"); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). That risk is especially great in this case because defending against petitioners' claims likely will require Comerica to seek discovery from third parties (including LaSalle Bank) concerning the relevant events, which occurred some seven years ago.

B. Petitioners Impermissibly Lump Together Waiver Claims Against Both Plaintiffs And Defendants To Generate A False Conflict.

In applying the totality of the circumstances test to a claimed waiver of arbitration, the lower courts regard the litigation status of the party charged with waiver as an important factor. Where that party *initiated* the litigation and thus plainly *chose* not to arbitrate, a finding of waiver is more likely than where a party simply participated in a judicial proceeding initiated by the other party.

Petitioners fail to account for this critical difference. Almost all the cases that petitioners contend conflict with the decision below involved a claimed waiver *by the defendant* in a court action initiated by the other party. See cases cited at Pet. 19-20. But in cases like this one, where petitioners were plaintiffs in the state court action that they initiated, the inconsistency of their conduct with their agreement to arbitrate is obvious, necessarily reducing the importance of other factors, such as prejudice.

This point, and the absence of a true conflict on the waiver inquiry, has been recognized by the leading treatise on federal arbitration law. See 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 21.3.2.1A (Supp. 1999). Recognizing "the importance of being the complaining party in litigation as an important factor in waiver of the right to arbitrate," the authors explain that the Seventh Circuit's position is consistent with the position of the other courts of appeals:

> [I]t is necessary to distinguish between those choosing to use the litigation route as plaintiffs or counterclaimants and those who are defending where the other party has chosen litigation. While defendants have sometimes been held to have waived arbitration by their responses to litigation against them, the courts are generally reluctant to find sufficient prejudice to the

> plaintiff (or other claimant) from those activities to find waiver.
>
> On the other hand, in quite a few cases courts have explicitly or impliedly distinguished between defendants and plaintiffs and have held that parties initiating litigation have thereby waived their right to arbitrate. * * * [T]here appear to be considerably more cases where the courts have found prejudice respecting plaintiffs than there are respecting defendants. Thus, at least respecting plaintiffs (and probably counter- and cross-claimants), the prejudice requirement may be considerably weaker, and *in actual operation not far from the Seventh Circuit position.*"

Ibid. (emphasis added; footnotes omitted).[4/]

Petitioners rely (Pet. 16) on a single case where the absence of prejudice led to a finding of no waiver on the part of a plaintiff. See *Stifel, Nicolaus & Co.* v. *Freeman*, 924 F.2d 157 (8th Cir. 1991). But in *Stifel*, "no issues were litigated," *id.* at 159, and the plaintiff sought arbitration immediately after the defendant filed counterclaims (thereby placing the plaintiff in the position of defendant with respect to the counterclaims). In this case, to the contrary, the issues were litigated to the point where the state court ordered petitioners' complaint dismissed,

---

[4/] The courts have long distinguished waivers by plaintiffs from those by defendants. See *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir. 1942) (a plaintiff waives arbitration by suing on a contract rather than demanding arbitration, but the situation ordinarily is "different in the case of a defendant" who has not filed a counterclaim); *In re Ballard Shipping Co.*, 752 F. Supp. 546, 549 (D.R.I. 1990) (noting that "a plaintiff's initiation of a suit has been considered a determinative factor in a waiver analysis").

and petitioners' belated decision to arbitrate came as a reaction to that bad news, not to any counterclaims from other parties.

Moreover, in a more recent case, the Eighth Circuit pulled back from *Stifel*. In *Ritzel Communications, Inc.* v. *Mid-Am. Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 1993), the court found that the cross-claim defendants' motion for a separate trial represented an "initial choice to litigate" and was inconsistent with their arbitration rights. *Id.* at 969 & n.6. The Eighth Circuit relied heavily on *St. Mary's*, one of the Seventh Circuit decisions that petitioners claim (Pet. 21-22) conflict with the Eighth Circuit's position. *Ritzel*, 989 F.2d at 970. Indeed, the Eighth Circuit observed that in *St. Mary's* "[t]he Seventh Circuit recognized that waiver depends on the circumstance of each case." *Ibid.* The Eighth Circuit agreed with that formulation, holding that "[w]hether there is waiver depends on the particular facts before us" and concluding, "[a]fter examining all the circumstances," that arbitration had been waived. *Id.* at 971. Thus, *Ritzel* does not support petitioners' attempt to drive a doctrinal wedge between the Eighth and Seventh Circuits. Both courts address waiver claims with much the same totality of the circumstances approach, and any insignificant differences about how much weight to give the prejudice factor do not transform that common approach into a certworthy conflict.

II. THE PETITION RAISES NO IMPORTANT QUESTION REQUIRING RESOLUTION BY THIS COURT.

As this Court has emphasized repeatedly, the FAA's purpose was to place arbitration agreements "upon the same footing as other contracts." *E.g.*, *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 474 (1989) (citation omitted). The FAA embodies a federal policy favoring enforcement of contracts, including agreements to arbitrate, and does not make arbitration agreements any more enforceable than other

contracts. *Id.* at 478. Thus, like any other contractual right, arbitration may be waived, and the decision below simply applied that established principle to the factual circumstances existing here.

Petitioners' contention (Pet. 25) that the decision below undermines the "the national policy favoring arbitration" rests on a misunderstanding of that policy. According to petitioners (*id.* at 26), courts must "resolve any doubts of arbitrability and waiver in favor of arbitration." But it is well settled that the FAA "does not confer a right to compel arbitration of any dispute at any time," and federal policy does not favor arbitration where agreement to arbitrate is lacking. *Volt*, 489 U.S. at 474. Thus, this Court has emphasized that whether the parties have agreed to arbitrate (as opposed to whether a dispute is within the scope of an arbitration agreement) is not a question subject to any pro-arbitration policy but is to be decided based on neutral contract law principles. See *First Options, Inc.* v. *Kaplan*, 514 U.S. 938, 944-945, 947 (1995).

At bottom, "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," but to ensure that arbitration agreements are enforced "according to the intentions of the parties." *First Options*, 514 U.S. at 947. Accordingly, whether a party has waived its right to arbitrate – *i.e.*, whether it has demonstrated an intent not to arbitrate – is not subject to any pro-arbitration policy presumption. Because "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration" (*id.* at 945), federal policy does not authorize a party to reclaim a right to arbitrate that it repudiated by going to court. Just as parties subject to an arbitration agreement may agree to exclude certain claims from that agreement (*Volt*, 489 U.S. at 478), so a party may forfeit an agreement to arbitrate its claims by seeking to resolve them judicially – precisely what occurred in this case. Recognizing that a party may waive its right to arbitrate simply gives effect to the "expectations of the

parties, without doing violence to the policies behind the FAA." *Id.* at 479. And how courts weigh the many factors bearing on waiver does not even implicate those policies, much less do violence to them.

Finally, even if this case raised any issues sufficiently important to warrant this Court's review, it would be an unsuitable candidate to resolve those issues because the decision below rested largely on plaintiffs' manifest bad faith. They played the litigation card as long as they thought it favorable and turned to arbitration only because they were "disappointed" with the state court's dismissal of their complaint. Pet. App. 7a. Such game-playing is repugnant no matter what the waiver standard, making petitioners' case unworthy of review by this Court. See *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 517 (1974) (courts should not construe arbitration law to invite "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages"); *Cabinetree*, 50 F.3d at 391 (waiving party "wanted to play heads I win, tails you lose"); *Gilmore* v. *Shearson/Am. Express Inc.*, 811 F.2d 108, 113 (2d Cir. 1987) (warning that a delayed assertion of arbitration may be a "tactic in a war of attrition").

III. THIS COURT'S DECISION IN *GREEN TREE FINANCIAL* HAS RESOLVED THE SECOND ISSUE PRESENTED.

After the petition was filed, this Court decided *Green Tree Fin. Corp.* v. *Randolph*, 121 S. Ct. 513 (2000), which held that where "the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of [FAA] § 16(a)(3), and therefore appealable." *Id.* at 521. That is precisely the situation here. *Green Tree* thus resolved the second issue presented in the petition, and the jurisdiction of the court of appeals to hear this case is no longer at issue.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

JAMES C. SCHROEDER
Counsel of Record
WILLIAM E. DEITRICK
JEFFREY W. SARLES
DAVID W. FULLER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

MARCH 2001

Supreme Court, U.S.
FILED
MAR 16 200
OFFICE OF THE CLERK

No. 00-938

In the Supreme Court of the United States

ANDREW S. GRUMHAUS and
LESLIE GRUMHAUS DAVIDSON,
Petitioners,

v.

COMERICA SECURITIES, INC.,
as successor-in-interest to Comerica
Financial Services, Inc.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ROBERT P. BRAMNIK
Counsel of Record
JONATHAN W. YOUNG
THOMAS I. MATYAS
CHRISTOPHER M. KANIS
WILDMAN, HARROLD, ALLEN & DIXON
225 WEST WACKER DRIVE
CHICAGO, IL 60606-1229
(312) 201-2000

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. COMERICA CANNOT NEGATE THE SUBSTANTIAL CIRCUIT SPLIT ON THE ROLE OF PREJUDICE IN AN ANALYSIS OF ARBITRAL WAIVER. 1

II. THE LINK BETWEEN PREJUDICE AND WAIVER HAS REAL IMPORTANCE FOR THE VINDICATION OF ARBITRATION RIGHTS. 6

III. COMERICA HAS NOT SUFFERED PREJUDICE. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

First Options, Inc. v. Kaplan,
514 U.S. 938 (1995) 6

Gavlik Constr. Co. v. H.F. Campbell Co.,
526 F.2d 777 (3rd Cir. 1975) 4

Green Tree Fin. Corp. v. Randolph,
121 S. Ct. 513 (2000) 10

In re Ballard Shipping Co.,
752 F.Supp. 546 (D.R.I. 1990) 4

In re Crysen/Montenay Energy Co.,
226 F.3d 160, 163 (2nd Cir. 2000),
petition for cert. filed (Jan. 11, 2001)
(No. 00-1119) 2, 3

Iowa Grain Co. v. Brown,
171 F.3d 504 (7th Cir. 1999) 6

Kulukundis Shipping Co. v. Amtorg Trading Corp.,
126 F.2d 978 (2d Cir. 1942) 4

Menorah Insurance Co., Ltd v. INX Reinsurance Corp.,
72 F.3d 218 (1st Cir. 1995) 2, 7

Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
39 F.3d 1482 (10th Cir. 1994) 2

Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 24-25 7

Navieros Inter-Americanos, S.A. v. M/V Vasilia Express, 120 F.3d 304 (1st Cir. 1997) 7

PPG Industries, Inc. v. Webster Auto Parts, Inc., 128 F.3d 103 (2d Cir. 1997) 3

Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156 (5th Cir. 1986) 2

Ritzel Communications, Inc. v. Mid-Am Cellular Tel. Co., 989 F.2d 966 (8th Cir. 1993) 5

S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc., 906 F.2d 1507 (11th Cir. 1990) 3

S+L+H S.p.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518 (7th Cir. 1993) 2

Stifel, Nicolaus & Co. v. Freeman, 924 F.2d 157 (8th Cir. 1991) 4, 5

Other Authorities

2 Ian R. MacNeil, Federal Arbitration Law, § 21.3.2.1A (Supp. 1999) 4, 5

In their Petition for a Writ of Certiorari (hereinafter cited as "Pet."), Petitioners Andrew S. Grumhaus ("Drew") and Leslie Grumhaus Davidson ("Leslie") identify a clear and substantial split in the courts of appeal as to the significance of prejudice in an analysis of arbitral waiver. Pet. at 15-24. In its Brief for the Respondent in Opposition (hereinafter cited as "Opp."), Respondent Comerica Securities, Inc. ("Comerica") opposes further review of this case by (i) asserting there is no "genuine conflict" on this issue, (ii) suggesting that the Petition fails to raise an "important question" and (iii) claiming that it has been prejudiced by the course of this litigation. Each of these propositions is demonstrably wrong and, in many respects, contradicted by the authorities cited in the opposition brief and the record below. In short, Comerica's brief reinforces, rather than refutes, the need for this Court to resolve the conflict among the circuits identified in the Petition.

I. COMERICA CANNOT NEGATE THE SUBSTANTIAL CIRCUIT SPLIT ON THE ROLE OF PREJUDICE IN AN ANALYSIS OF ARBITRAL WAIVER.

As Comerica would have it, the courts of appeals "uniformly evaluate a claim of waiver by looking to the totality of the circumstances and applying multiple factors." Opp. at 5. In connection with this "'uniform" evaluation, Comerica posits that prejudice to the party claiming waiver is but one of the factors used in the analysis. Opp. at 6. Indeed, Comerica goes so far as to characterize the diametrically opposed views of the circuits on the necessity of prejudice as "minor variations in the weight given to particular factors." Opp. at 4. As even Comerica's own authorities demonstrate, however, these "minor variations" are, in actuality, an irreconcilable circuit split on a pivotal

question: is prejudice to the party claiming waiver a threshold requirement to a finding of arbitral waiver?

As an initial matter, not all courts look to the "totality of the circumstances" in evaluating claims of arbitral waiver. For example, in *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156 (5th Cir. 1986), the Fifth Circuit held that "prejudice to the party seeking arbitration... is determinative of whether a court should deny arbitration on the basis of waiver." *Id.* at 1162. Indeed, the court in *Price* specifically noted the existence of the "totality of the circumstances" line of cases but expressed skepticism as to the propriety of "the use of criteria other than 'prejudice' to the party opposing arbitration in determining whether arbitration rights have been waived." *Id.* at 1162, fn2. Likewise, in *Menorah Insurance Co., Ltd v. INX Reinsurance Corp.*, 72 F.3d 218 (1st Cir. 1995), the First Circuit acknowledged the split, and contrasted its prior holdings that prejudice was a "litmus test" for claims of arbitral waiver with the "totality of the circumstances" approach employed in the Seventh and Tenth Circuits. *Id.* at 221, *citing Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994); *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1527 (7th Cir. 1993). Because prejudice had been clearly established, the *Menorah* court declined to reconsider its prior holdings. *Id.*

More importantly, Comerica misses the point when it presupposes that a "totality of the circumstances" analysis precludes a finding that prejudice is a threshold requirement of arbitral waiver. As Comerica's citation to *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 163 (2nd Cir. 2000), petition for cert. filed (Jan. 11, 2001) (No. 00-1119) demonstrates, even where a court employs a multi-factored analysis, prejudice may still be a threshold requirement to a

finding of waiver. Indeed, in the paragraph immediately preceding the one cited by Comerica, the *Crysen/Montenay* court held:

> **[A] party waives its right to arbitration when it engages in protracted litigation that prejudices the opposing party.** [P]rejudice as defined by our cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. **Incurring legal expenses inherent in the litigation, without more, is insufficient evidence of prejudice to justify a finding of waiver.**

Id. at 162-63, *quoting PPG Industries, Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107-08 (2nd Cir. 1997) (emphasis added). The fact that even some majority-view courts consider factors in addition to prejudice in no way diminishes the importance of the prejudice inquiry as a threshold requirement in those courts. In *S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990), the Eleventh Circuit explained that "[a] party has waived its right to arbitrate if, under the totality of the circumstances, the . . . party has acted inconsistently with the arbitration right, **and**, in so acting, has in some way prejudiced the other party." (emphasis added, internal citations omitted).

Comerica complains that Drew and Leslie have "generated a false conflict" by "lumping together" waiver claims involving plaintiffs and waiver claims involving defendants. Opp. at 10-12. To support this proposition, Comerica relies primarily upon a treatise by Professor Ian

MacNeil.[1] In that treatise, Professor MacNeil argues "quite a few" courts have "explicitly or impliedly" distinguished between plaintiffs and defendants—a distinction which Professor MacNeil advocates. *See* 2 Ian R. MacNeil, Federal Arbitration Law, § 21.3.2.1A (Supp. 1999). Nevertheless, while Drew and Leslie disagree with Professor MacNeil's characterization of the cases he cites, even Professor MacNeil acknowledges that not all courts recognize such a distinction. *See Id.* at fn 24p, *citing Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157 (8th Cir. 1991); *see also Id.* at § 21.3.2.2, *citing Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3rd Cir. 1975) (defendant/third-party plaintiff did not waive arbitration by filing suit against third-party defendant). Likewise, it is beyond dispute that the *vast* majority of cases on arbitral waiver make no mention of Professor MacNeil's suggested distinction.[2]

---

[1] In a footnote, Comerica also cites to two cases which offer poor support for its position. The first, a 60-year-old case entitled *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2nd Cir. 1942), rejected claims that a **defendant** had waived arbitration. The second, *In re Ballard Shipping Co.*, 752 F.Supp. 546 (D.R.I. 1990), is selectively and misleadingly quoted by Comerica. Comerica excerpts the following language from *Ballard Shipping*: "a plaintiff's initiation of a suit has been considered a determinative factor in a waiver analysis." Opp. at 11, fn4. The full quotation, in context, is as follows: "**In most cases a plaintiff's mere filing of a complaint does not constitute waiver**. However, a party's initiation of suit is certainly a relevant factor in analyzing whether it has waived its right to compel arbitration. **In some cases**, a plaintiff's initiation of a suit has been considered a determinative factor in a waiver analysis." 752 F.Supp. at 549 (emphasis added, internal citations omitted).

[2] Comerica's citation to Professor MacNeil's treatise is ironic in light of Comerica's position that there is no true conflict among

Further, as Professor MacNeil recognized, the Eighth Circuit's opinion in *Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157 (8th Cir. 1991) "runs against the grain" of his argument. 2 Ian R. MacNeil, Federal Arbitration Law, § 21.3.2.1A at fn 24p. In *Stifel*, the Eighth Circuit held that the plaintiff had not waived its right to arbitration, even though it had initiated litigation by filing a lawsuit in federal court. The court reasoned that although the plaintiff had initially acted inconsistently with its right to arbitrate, there could be no waiver because the defendant had not been prejudiced.

Comerica attempts to explain away *Stifel* by stating that "the Eight Circuit pulled back from *Stifel*" in *Ritzel Communications, Inc. v. Mid-Am Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 1993). Opp. at 12. Comerica's claim is difficult to fathom. Far from "pulling back" from *Stifel*, *Ritzel* not only reaffirms *Stifel*, but **relies** on it. The *Ritzel* court held that "we will find waiver where the party claiming the right to arbitrate: (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; **and** (3) **prejudiced the other party by these inconsistent acts**." *Ritzel*, 966 F.2d at 968, *citing Stifel*, 924 F.2d at 158 (emphasis added). Applying the *Stifel* standard to the case before it, the *Ritzel* court found "obvious and substantial" prejudice—and therefore a waiver. *Id.* at 971. The *Ritzel* decision simply does not and cannot support Comerica's argument. The *Stifel* decision--and its recognition of prejudice as a threshold

---

the circuits. In fact, Comerica's citation from Professor MacNeil is taken from a section entitled "Prejudice: The Key to Waiver." § 21.3.2. More specifically, they quote from a subsection discussing the unique developments in the Seventh Circuit, entitled, "Dissent from the Prejudice Requirement." § 21.3.2.1A.

requirement of arbitral waiver--remains the law of the Eighth Circuit, and of a majority of other federal circuits.

Even within the Seventh Circuit, the plaintiff/defendant distinction urged by Comerica has not been uniformly recognized. In one recent decision, a Seventh Circuit panel affirmed a finding that the customer/plaintiffs had not waived their right to arbitration by commencing a purported federal class action against a commodity broker. *Iowa Grain Co. v. Brown*, 171 F.3d 504, 505-07, 511 (7th Cir. 1999).[3] While evaluating the claim of waiver under a "totality of the circumstances" analysis, the Seventh Circuit panel permitted parties to proceed to arbitration, even though they were initially plaintiffs in a non-arbitral forum. *See Id.*

II. THE LINK BETWEEN PREJUDICE AND WAIVER HAS REAL IMPORTANCE FOR THE VINDICATION OF ARBITRATION RIGHTS.

Comerica endeavors to downplay the significance of the issues in this case, arguing that (i) an analysis of arbitral waiver "is not subject to any pro-arbitration policy presumption" (Opp. at 13) and (ii) "[e]ven if prejudice were deemed a required element, as petitioners propose, the impact would be nonexistent or negligible." (Opp. at 8). Neither of these arguments holds water.

In arguing that the waiver analysis is not subject to a pro-arbitration policy presumption, Comerica cites *First Options, Inc. v. Kaplan*, 514 U.S. 938 (1995). Opp. at 13. This case simply does not speak to the issue. Instead, as

---

[3] In a striking similarity to this case, the plaintiffs in *Iowa Grain* sought arbitration following the dismissal of their purported class action **without prejudice**. *Iowa Grain*, 171 F.3d at 507.

Comerica correctly states earlier on the same page of its brief, *First Options* holds that the existence of an arbitration agreement is judged according to neutral contract principles. However, as this Court has made absolutely clear, an analysis of arbitral waiver must be conducted with a pro-arbitration perspective. *See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24-25 ("[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself **or an allegation of waiver**")(emphasis added). By ignoring this rule of construction, Comerica undermines the national policy favoring arbitration. Pet. at 24-28.

In its argument that the prejudice requirement--if adopted--would have a minimal impact on the waiver analysis (Opp. at 8), Comerica cites two completely inapposite First Circuit cases—both of which involved district court findings of prejudice. *See Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997) (party seeking arbitration waited until day before trial began to request arbitration); *Menorah Ins. Co.*, 72 F.3d at 221 (defendant initially *opposed* arbitration, then waited 14 months before reversing course, during which time plaintiff had obtained a default judgment against defendant). These cases--which involved substantial litigation activity--are irrelevant to the question before the Court. That question--whether arbitral waiver can be found in the **absence** of prejudice to the party opposing arbitration--plainly has the potential to change the outcome of this and many other cases. Here, the district court made detailed findings of fact, and concluded that Comerica had **not** been prejudiced by Drew and Leslie's litigation in state court—which the district court described as "brief and minimal" and "skeletal"—prior to the request for arbitration.

Pet. App. at 20a-21a. The Seventh Circuit did not overturn the district court's finding on this issue.[4] Accordingly, in any of the eight majority rule circuits, Drew and Leslie would have been permitted to enforce their right to arbitrate with Comerica, and this case might well be over by now. Instead, because this case arose in a circuit which takes a radically expansive view of arbitral waiver, Drew and Leslie can only seek relief on this issue from this Court.

III. COMERICA HAS NOT SUFFERED PREJUDICE.

Comerica argues, in a footnote, that it was "inherently prejudiced by [Drew and Leslie's] long delay in seeking arbitration." Opp. at 9, fn 3. Comerica explains that its prejudice stems from the fact that this alleged delay will allow witnesses' memories to fade, and evidence to be lost. *Id.* Comerica even goes so far as to accuse Drew and Leslie of "bad faith" in seeking arbitration.[5] These arguments and

---

[4] Comerica implicitly suggests that the court of appeals **did** reverse the District Court's factual findings on this issue, because the Seventh Circuit concluded that "Comerica was not *unduly* prejudiced by the Grumhaus children's delay in seeking arbitration." Pet. App. 11a, *cited in* Opp. at 9, emphasis added by Comerica. The word "unduly" simply cannot be stretched to this point. Given the trial court's express finding that Comerica was **not** prejudiced (Pet. App. at 21a), and because the panel necessarily reviewed findings of fact under a clear error standard (Pet. App. at 5a), the language quoted by Comerica is most logically read as a grudging **affirmance** of the district court's finding of no prejudice.

[5] Comerica's "bad faith" allegation relies wholly on a line in the Seventh Circuit's opinion, which reads as follows: "Understandably disappointed with [the state court's dismissal of the complaint], the Grumhaus children decided that they wanted to arbitrate." App. at 7a, cited in Opp. at 14. This statement in

accusations are flatly contradicted by the decision of the district court, which found:

> Comerica should have known since March 1998 that arbitration was a possible course of action, and has known since May 1998 that plaintiffs intended to pursue arbitration of its dispute. Comerica did not contest plaintiffs' right to arbitrate until February 1999, when it responded to the NASD's notice of plaintiffs' arbitration claim against it. Comerica cannot, and does not, attempt to argue that it was surprised when plaintiffs filed for arbitration or that its claims and defenses will be adversely affected if required to arbitrate this dispute. Comerica will suffer no prejudice from an order compelling arbitration.

Pet. App. at 21a-22a. Notably, none of these factual findings was reversed by the Court of Appeals.[6] Accordingly, Comerica's belated claims of prejudice have no foundation in the record. It is far too late in the day for these claims to be asserted now.

---

the opinion is wholly unsupported by the record, and is directly contrary to the express findings of the district court judge who was closest to the proceedings. In any event, the statement does not support Comerica's gratuitous and unfounded accusation. Moreover, after failing to interpose any objection to its dismissal from the state court case--where the dismissal was taken for the express and stated purpose of pursuing arbitration--and then seeking to intervene back into the same case from which it had previously been dismissed, Comerica's complaints about "bad faith" and "tactical litigation" ring hollow.

[6] *See* footnote 4, *supra*.

Finally, it is worth noting that Comerica did have an opportunity to litigate Drew and Leslie's claims on an expedited timetable—by participating in the NASD arbitration. Comerica could not have been prejudiced by this choice of forum, given that **its own account opening documentation** listed the NASD as a permissible venue. For Comerica to complain about the passage of time during this litigation, after having resisted arbitration in one of its chosen fora, is perplexing.

CONCLUSION[7]

The Petition for Certiorari should be granted.

Respectfully submitted,

/s/_____

Robert P. Bramnik
Counsel of Record
Jonathan W. Young
Thomas I. Matyas
Christopher M. Kanis
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
Chicago, Illinois 60606-1229
(312) 201-2000

March 16, 2001

---

[7] Drew and Leslie concur with Comerica that this Court's decision in *Green Tree Fin. Corp. v. Randolph*, 121 S. Ct. 513 (2000)--rendered after the filing of the Petition -- has resolved the second question presented in the Petition.